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No. 91-610

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

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LOCAL 144 NURSING HOME PENSION FUND, *et al.*,  
*Petitioners,*

v.

NICHOLAS DEMISAY, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

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**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED OCTOBER 10, 1991  
CERTIORARI GRANTED JUNE 22, 1992





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# CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Aug. 7, 1985	—Plaintiffs' original complaint in U.S. District Court for the Southern District of New York filed.
Aug. 28, 1985	—Plaintiffs' first amended complaint filed.
Jan. 7, 1986	—Order entered permitting Plaintiffs to file second amend complaint.
Jan. 24, 1986	—Defendants' answer to Plaintiffs' second amended complaint filed.
Nov. 25, 1986	—Plaintiffs' third amended complaint filed.
Dec. 22, 1986	—Defendants' answer to Plaintiffs' third amended complaint filed.
Jan. 13, 1987	—Plaintiffs' Reply to Defendants' counterclaims filed.
Apr. 13, 1987	—Plaintiffs' Motion for Partial Summary Judgment filed.
Jun. 16, 1987	—Defendants' Motion for Summary Judgment on counterclaims and entry of Default Judgment filed.
Jun. 16, 1987	—Defendants' Motion to Dismiss for lack of jurisdiction and standing filed.
Jun. 16, 1987	—Defendant intervener's answer to third amended complaint and counterclaims filed.
Mar. 8, 1988	—Order denying Defendants' Motion for Summary Judgment on counterclaims entered.
Mar. 15, 1989	—Order denying Plaintiffs' Motion for Partial Summary Judgment and granting Defendants' Motion for Summary Judgment entered.

DATE	PROCEEDINGS
Aug. 28, 1990	—Judgment of District Court denying Plaintiffs' Motion for Partial Summary Judgment, and Granting Defendants' Motion to Dismiss and Defendants' Motion for Summary Judgment entered. Counterclaims are dismissed with prejudice.
Sep. 26, 1990	—Plaintiffs' notice of appeal filed.
Jun. 12, 1991	—Opinion and mandate of the Court of Appeals for the Second Circuit filed.



## Third Amended Complaint

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 6133 (JES)

NICHOLAS DEMISAY, ERNEST DICKER, JACK FRIEDMAN and ABRAHAM GROSSMAN as Trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a AMERICAN NURSING HOME, Abraham Grossman, individually and d/b/a BRUCKNER NURSING HOME, LYDEN NURSING HOME and WILLIAMSBRIDGE MANOR NURSING HOME, B.N.H. MANAGEMENT ASSOCIATES, INC., Ernest Dicker, individually and d/b/a CLEARVIEW NURSING HOME, SEACREST NURSING HOME and SHOREVIEW NURSING HOME, Nicolas Demisay, individually and d/b/a CLOVE LAKES NURSING HOME, Desdemona Jones Caruso, individually and d/b/a FIELDSTON LODGE NURSING HOME, Jack Friedman, individually and d/b/a FORT TRYON NURSING HOME, FRANKLIN NURSING HOME, and FRIEDWALD HOUSE HRF, WALD MANAGEMENT ASSOCIATES, INC., 801 190th STREET MANAGEMENT ASSOCIATES, INC., 142-27 FRANKLIN AVENUE MANAGEMENT ASSOCIATES, INC., EDWARD WIZNER, as employee of Clearview Nursing Home and participant in the plaintiff funds and defendant funds, MARTHA MULLIGAN, ELIZABETH METCALF, IVY WAITE, CURLENE MCINTOSH, ANELIA TROUT, SEENA MORENO, MICHAEL HERMUR, PAMELA WOODS, ANDREW LENZA, MARY DiBRIENZA, EULOEIA REYES, MARLENE LOUIS, MARY MOZZOLO, FRED GERILLO, DONNA JACOBSEN, ELSA RIVILLA, HELEN LEAVY, CONNIE CARU-

SELLE as employees of Clove Lakes Nursing Home and participants in the plaintiff funds and defendant funds, YVONNE FERNICOLA, DAVID PABON, CYNTHIA LEE, as employees of Franklin Nursing Home and participants in the plaintiff funds and defendant funds, ANITA HARRIS as employee of Seacrest Nursing Home and participant in the plaintiff funds and defendant funds, MARY LINDSAY, as employee of Shoreview Nursing Home and participant in the plaintiff funds and defendant funds,

*Plaintiffs,*

- against -

LOCAL 144 NURSING HOME PENSION FUND, NEW YORK CITY NURSING HOME-LOCAL 144 WELFARE FUND, PETER OTTLEY, JOHN KELLY, AUSTIN CEDENO, FRANK MCKINNEY, BARTHOLOMEW J. LAWSON, FRED WILKENS, WILLIAM MCCARTHY and MARSHA MCLENDON, as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund,

*Defendants.*

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### THIRD AMENDED COMPLAINT

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#### NATURE OF THE ACTION

1. This is an action under 29 U.S.C. §§ 302 and 1132 to recover for the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund (hereinafter collectively referred to as the "Southern Funds") that portion of the corpuses of the Local 144 Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund (hereinafter collectively referred to as the "Greater Funds") that represents the contributions made by plaintiff employers on behalf of plaintiff em-

employees and all other similarly situated employees, and as to which the Southern Funds have assumed the corresponding liabilities. Plaintiff employees also seek a declaration under these same statutory provisions that the defendant trustees have breached their fiduciary duty by refusing to transfer these funds and thereby failing to utilize such funds for the sole and exclusive benefit of the employees for whom they were contributed. Finally, this action is commenced under 29 U.S.C. § 1451 to require the defendant trustees of the Greater Funds to adopt rules on asset transfer as required by 29 U.S.C. § 1414, which rules would require transfer of the assets sought pursuant to the claims under 29 U.S.C. §§ 302 and 1132.

### THE PARTIES

2. Plaintiffs Nicholas Demisay, Ernest Dicker, Jack Friedman and Abraham Grossman are the duly designated management trustees of the Southern Funds. The Southern Funds are duly established trust funds, existing pursuant to 29 U.S.C. § 186(c)(5), and are "employee benefit plans" within the meaning of 29 U.S.C. § 1002(3).

3. Plaintiffs Joseph Unger, as executor for the estate of Moses Unger, Abraham Grossman, Ernest Dicker, Nicholas Demisay and Desdemona Jones Caruso are, and all times material hereto were, owners and operators of health care facilities and "employers" within the meaning of 29 U.S.C. § 1002(5). In or about 1984, Abraham Grossman ceased being an employer insofar as he does business as Bruckner Nursing Home, which has not been a party to a collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, APL-CIO (sic) ("Local 144") since on or about that same date.

4. Plaintiff Jack Friedman is an owner and operator of health care facilities, and at certain times material hereto was an "employer" within the meaning of 29

U.S.C. § 1002(5). (Plaintiff Friedman and the plaintiffs identified in paragraph 3 hereinafter shall be referred to collectively as the "Employers").

5. Plaintiff B.N.H. Management Associates, Inc. ("B.N.H."), Wald Management Associates, Inc. ("Wald"), 801 190th Street Management Associates, Inc. ("801 Management") and 142-27 Franklin Avenue Management Associates, Inc. ("Franklin Management") (hereinafter referred to collectively as the "Management Companies") are, and at certain times material hereto were, "employers" within the meaning of 29 U.S.C. § 1002(5).

6. All the plaintiff employers are members of Southern New York Residential Health Care Facilities Association, Inc. ("Southern New York"), a nonprofit trade association chartered under New York law. Each plaintiff employer negotiates and executes an individual collective bargaining agreement with Local 144.

7. Plaintiffs Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Morena, Michael Heimur, Pamela Woods, Andrew Lenza, Mary DiBrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola, David Pabon, Cynthia Lee, Anita Harris and Mary Lindsay are, and at all times material hereto were, employees, within the meaning of 29 U.S.C. § 1002(6), of either one of the Employers or one of the Management Companies and participants, within the meaning of 29 U.S.C. § 1002(7), in either the Greater Funds and/or Southern Funds (hereinafter referred to collectively as the "Employees").

8. Upon information and belief, defendants Local 144-Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund ("Greater Funds") are, and at all times material hereto were, jointly trustee, multi-employer trust funds created and existing pursuant to 29 U.S.C. § 186(c)(5) and "employee benefit plans"

within the meaning of 29 U.S.C. § 1002(3). The Greater Funds principal offices are located within the County and State of New York.

9. Upon information and belief, defendants Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William McCarthy and Marsha McLendon are, and at all times material hereto were, the duly designated trustees of the Greater Funds.

### JURISDICTION AND VENUE

10. Jurisdiction over the subject matter of this action is predicated on Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186; the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. §§ 1104, 1132(e)-(f), 1414, 1451(c); and 28 U.S.C. §§ 1331 and 2201.

11. Venue is based on 29 U.S.C. §§ 1132(e), 1451(d); and 28 U.S.C. § 1391(b). The Greater Funds are administered, and all defendants transact business, within this judicial district; the breach of fiduciary duty hereinafter alleged took place in this district; and the causes of action hereinafter alleged arose within this district.

### BACKGROUND

12. Until in or about 1981, the plaintiff Employers were all members of Greater New York Health Care Facilities Association, Inc. ("Greater New York")—a multi-employer bargaining association—and thereby were parties to the collective bargaining agreements between Greater New York and Local 144. Under those agreements, the Plaintiff Employers were contractually obliged, and did contribute to the Greater Funds on behalf of all their employees covered by those agreements, including the plaintiff Employees.

13. Upon withdrawing from Greater New York in or about 1981, the plaintiff Employers joined Southern New



York and negotiated and executed individual collective bargaining agreements with Local 144.

14. Until November 1984, each plaintiff Employer, pursuant to its individual collective bargaining agreements with Local 144, was contractually obliged and did contribute to the Greater Funds on behalf of all their employees who were covered by those agreements, including plaintiff Employees.

15. On November 30, 1984, following the expiration and termination of each Employer's 1981-1984 collective bargaining agreements, B.N.H., as the employer at Bruckner Nursing Home, and each plaintiff Employer executed new individual collective bargaining agreements with Local 144. Each such agreement contains an identical section ("Southern Funds Section") providing for the establishment of the Southern Funds, which funds are to provide the covered employees with the same level of benefits as were then provided to them by the Greater Funds. A copy of one such collective bargaining agreement containing the Southern Funds Section is attached hereto as Exhibit A.

16. The Southern Funds Section of each such collective bargaining agreement provides in relevant part:

#### *Litigation*

It is understood that members of Southern [New York Residential Health Care Facilities Association, Inc. ("Southern New York") (i.e., Employers and Management Companies)] and authorized contributors may commence litigation against Local 144-Greater New York Funds to obtain for the Local 144-Southern Pension, Local 144-Southern Welfare and Local 144-Southern Education Funds and Local 144-Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to the contributions of members of Southern and au-

thorized contributors, on the condition that upon receipt of such monies the Local 144-Southern Funds shall assume liabilities of the Local 144-Greater New York Funds to employees of Southern members and/or authorized contributors. The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.

It is understood and agreed that as of the operational date of the Local 144-Southern Pension Fund, that the Local 144-Southern Pension Fund shall be established on a defined contribution basis with a target benefit of Three Hundred Fifty Dollars (\$350.00) per month. The Local 144-Southern Pension Fund shall be converted to a defined benefit plan as soon as practicable.

17. The Southern Funds Section of each such collective bargaining agreement further provides that the signatory employer shall continue to contribute to the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. In accordance with this provision, the Employers and/or Management Companies made contributions to the Greater Welfare Fund on behalf of their covered employees, including plaintiff Employees.

18. On or about October 18, 1985, valid and lawful trust agreements were executed establishing the Southern Funds. Copies of those trust agreements are attached hereto as Exhibits B and C.

19. On or about October 18, 1985, at a duly constituted meeting of the trustees of the Southern Funds, it was agreed that the Southern Funds would become operational on December 1, 1985. A true and correct copy of the minutes of that meeting is attached hereto as Exhibit D.

20. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, agreed that the Pension Fund of the Southern Fund shall be established as a defined benefit plan with a benefit of Three Hundred Fifty Dollars (\$350.00) per month. A true and correct copy of the minutes of that meeting are attached hereto as Exhibit E.

21. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, approved the Southern Pension Fund's assumption of the Greater Pension Fund's unvested liabilities for the past service credits of all participants in the Southern Funds. For example, an employee with nine years of credited service under the Greater Pension Fund who retires after participating in the Southern Pension Fund for one year is deemed vested under the Southern Pension Fund's ten-year service requirement and receives a monthly benefit from the Southern Pension Fund based on ten years of service. Thus, in this example, the Southern Pension Fund has assumed the Greater Pension Fund's liability for nine years' service credit. Despite this assumption of liabilities, the specific provision of the Employees' collective bargaining agreements and due demand therefor, the Greater Pension Fund has retained that portion of its corpus attributable to contributions made by the Employers and Management Companies and for which the Greater Pension Fund does not now have a corresponding liability by virtue of the Southern Pension Fund's assumption of liability.

22. At the same time, the Southern Welfare Fund assumed liability for welfare coverage of all participants in the Southern Funds. The Greater Welfare Fund, on information and belief, possesses significant reserves attributable to contributions made by the Employers and/or Management Companies on behalf of their employees but to whom the Greater Welfare Fund no longer has an obligation to provide welfare coverage by virtue of the Southern Welfare Fund's assumption of liability.



23. On or about October 1, 1985, the Employers and/or Management Companies ceased making contributions to the Greater Funds and began making contributions to the Southern Funds or its escrow account on behalf of their covered employees, including plaintiff Employees, in accordance with the terms of the collective bargaining agreements each has with Local 144.

24. Since October 1, 1985 to date, the Employers and/or Management Companies have continued to make contributions to the Southern Funds, or its escrow account, in accordance with the governing collective bargaining agreements and trust agreements on behalf of their covered employees including plaintiff Employees.

25. As of December 1, 1985, all of the covered employees of the Employers and/or Management Companies, approximately 1,981 in number, ceased participating in the Greater Funds and commenced participating in the Southern Funds. Since that date, the Southern Funds have provided all of the covered employees of the Employers and/or Management Companies with the same benefits as were provided to them by the Greater Funds.

### FIRST CLAIM FOR RELIEF

26. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraphs 1-25 of this Complaint.

27. Both the Greater Funds and the Southern Funds are jointly trustee funds established pursuant to 29 U.S.C. § 186(c)(5) for the sole and exclusive benefit of plaintiff Employees and all others similarly situated who are employees of the Employers and/or Management Companies and who are within Local 144's bargaining unit ("Similarly Situated Employees").

28. From the date on which each Employer and/or Management Company became obligated to contribute to the Greater Funds pursuant to a Local 144 collective bar-

gaining agreement until September 30, 1985, each Employer and/or Management Company made such contributions on behalf of their employees covered by those funds, including plaintiff Employees.

29. On December 1, 1985, the Southern Funds became operational and the Greater Funds ceased providing benefits to the plaintiff Employees and all Similarly Situated Employees other than those benefits which had vested on or before that date.

30. Upon information and belief, the Greater Funds maintain substantial corpuses derived in part from contributions made by the Employers and/or Management Companies on behalf of the plaintiff Employees and Similarly Situated Employees and for which the corresponding liability has been assumed by the Southern Funds.

31. Although the defendant trustees are required by their fiduciary obligation under 29 U.S.C. § 186(c)(5) to transfer to the Southern Funds that portion of Greater Funds' corpuses that is attributable to the contributions made by the Employer and/or Management Companies on behalf of the plaintiff Employees and Similarly Situated Employees and for which the Southern Funds have assumed the corresponding liability, they have failed to do so.

32. As a direct and proximate result of the Greater Funds' failure to make such a transfer to the Southern Funds, the Greater Funds are now structured and are being administered in violation of the requirements of 29 U.S.C. § 186(c)(5), as contributions made by the Employers and/or Management Companies are not being used for the sole and exclusive benefit of their employees.

## SECOND CLAIM FOR RELIEF

33. This Second Count is brought against defendants Peter Ottley, John Kelly, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William Mc-

Carthy and Marsha McLendon as trustees of the Greater Funds to enforce the rights of plaintiff Employees under Section 404 of ERISA, 29 U.S.C. § 1104.

34. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraphs 1-25 and 27-31.

35. The defendant trustees are fiduciaries within the meaning of 29 U.S.C. §§ 1002 (21) (A), 1102(a) and are required in that capacity to administer the Greater Funds solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and their beneficiaries.

36. By failing to transfer to the Southern Funds that portion of the Greater Funds' corpus attributable to contributions made by the Employer and/or Management Companies, and for which the Southern Funds have assumed the corresponding liabilities, the defendant trustees have failed to discharge their fiduciary duties to administer the Greater Funds solely in the interest of the participants and beneficiaries thereof.

37. In committing such a breach of their fiduciary duties, the defendant trustees have favored those individuals who continue to participate in the Greater Funds over those participants who are now participants in the Southern Funds, including plaintiff Employees.

38. As a direct and proximate result of defendant trustees' breach of their fiduciary duties, plaintiff Employees have suffered the loss of an as yet undetermined amount in the benefits to which they are entitled or may become entitled to under the Southern Funds.

### THIRD CLAIM FOR RELIEF

39. This Third Count is brought against defendants Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William Mc-

Carthy and Marsha McLendon as trustees of the Greater Funds to enforce plaintiff Employees' rights under ERISA, Section 404, 29 U.S.C. § 1104 and on behalf of all plaintiffs to require compliance with 29 U.S.C. § 1414.

40. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraph 1-25, 27-31, and 35-37.

41. The Greater Funds and Southern Funds are multi-employer plans within the meaning of 29 U.S.C. § 1002 (37).

42. The defendant trustees have failed to adopt, as required by 29 U.S.C. § 1414, asset-transfer rules which would permit without unreasonable restriction the transfer of plan assets in connection with the transfer of the plan liabilities.

43. By failing to adopt such asset transfer rules, defendant trustees have administered the Greater Funds in accordance with an instrument that is inconsistent with a provision of subchapter III of ERISA, 29 U.S.C. § 1414, and thereby have committed a prima facie breach of their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104.

44. As required by the Employers' and B.N.H.'s collective bargaining agreements with Local 144, the Southern Funds have assumed the Greater Pension Fund's unvested liabilities for the past service credits of all participants in the Southern Funds and the Greater Welfare Fund's obligation to provide welfare coverage to these participants. The Greater Funds, however, have not transferred to the Southern Funds that portion of their Funds' corpuses attributable to the contributions made on behalf of such participant/employees.

45. As a direct and proximate result of defendant trustees' failure to comply with 29 U.S.C. § 1414 and adopt asset transfer rules and their breach of their

fiduciary obligation to Plaintiff employees, plaintiffs have been deprived of a transfer of the portion of the Greater Funds' corpuses attributable to the contributions made by the Employers and the Management Companies and as to which the Southern Funds have assumed the corresponding liabilities.

WHEREFORE, plaintiffs demand:

(1) That judgment be entered against the defendants on the first claim for relief ordering and directing the defendants to account to the plaintiffs for all transactions, including but not limited to all monies received and paid out by the defendants on behalf of the Greater Funds, and all assets and liabilities of the Greater Funds; and further ordering and directing defendants to transfer to the Southern Funds that sum of money which the Court determines represents the portion of the Greater Funds' corpuses attributable to contributions made by the Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(2) That judgment be entered against defendant trustees on the second claim for relief enjoining and restraining the defendant trustees from continuing to administer the Greater Funds in the discriminatory manner complained of herein; declaring that defendant trustees breached their fiduciary obligation to plaintiff Employees under 29 U.S.C. § 1104 by so administereing (sic) the Greater Funds; and ordering and directing the defendant trustees to transfer to the Southern Funds that portion of the Greater Funds' corpuses attributable to contributions made by the Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(3) That judgment be entered against defendant trustees on the third claim for relief declaring that defendant trustees breached their fiduciary obligation to plain-

tiff Employees by failing to adopt the asset transfer rules required by 29 U.S.C. § 1414; and ordering and directing defendant trustees to comply with 29 U.S.C. § 1414 by adopting the required asset transfer rules by and on behalf of the Greater Funds, and thereafter pursuant to said rules, to transfer to the Southern Funds that portion of the Greater Funds' corpus attributable to contributions made by the Employers and or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(4) That this Court grant plaintiffs such other and further relief as it shall deem appropriate and award plaintiffs the cost of this action including reasonable attorney's fees.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds  
 JONATHAN L. SULDS  
 9 West 57th Street  
 New York, New York 10019  
 (212) 906-7924  
 Attorneys for Plaintiffs

Dated: New York, New York  
 November 19, 1986



— Exhibit A

**Representative Agreement between Local 144  
and Southern Association Member, dated  
November 30, 1981**

---

AGREEMENT made and entered into this 30th day of November, 1984, by and between LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICES UNION, SEIU, AFL-CIO ("Union"), and \_\_\_\_\_ ("Signatory Facility"), a member of the Southern New York Residential Health Care Facilities Association, Inc., ("Association" or "Southern").

WITNESSETH:

WHEREAS, collective bargaining agreements by and between the Union and Signatory Facilities, members of the Association, expired by their own terms on March 31, 1984; and

WHEREAS, the parties desire to extend and renew the said collective bargaining agreements as applicable;

NOW THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

I. The said collective bargaining agreements, as applicable, are hereby extended and renewed for a period commencing April 1, 1984, and continuing through and including March 31, 1987, as more particularly set forth herein, with all of the terms and conditions therein contained, except as modified in paragraph II hereof.

II. The said collective bargaining agreements, as applicable, as extended and renewed, are modified as follows:

## A. WAGE INCREASES

1. There shall be immediately payable to all employees a lump sum payment as follows:

Blue Collar	\$275.00
LPN	\$375.00
RN	\$425.00

2. Effective July 15, 1984, there shall be a six and one-half percent (6½%) increase in the wages of all employees. The dollar amount of such increase shall be as follows:

Blue Collar	\$ 21.06
LPN	\$ 25.03
RN	\$ 29.90

3. Effective July 15, 1985, there shall be an additional seven percent (7%) increase in the wages of all employees. The dollar amount of such increase shall be as follows:

Blue Collar	\$ 24.15
LPN	\$ 28.70
RN	\$ 34.30

3a. The wage increases referred to in subparagraphs "2" and "3" above shall be added to the minimums.

4. Effective March 1, 1986, the parties shall meet to negotiate increases in wages or other economic benefits, if any, to be effective on or after April 1, 1986, through and including March 31, 1987. If the parties have not resolved the matter of wage or economic benefit increases by July 1, 1986, then either party may submit to arbitration, to Eric Schmertz, the question of wages and economic benefit increases, for the period April 1, 1986 through and including March 31, 1987.

The arbitrator shall have no authority to award any wage or other economic benefit increases which, when added to the cost of the contract for the year 1986, shall result in a total labor cost for the year 1986 which may



be in excess of the facility's base year labor cost trended forward to the calendar year 1986 with due credit being given to any moratoria provided herein for the calendar year 1986 and any adjustments provided by the State for the calendar year 1986 to the labor trend factor. (Or in the event that a new and/or different methodology may be applicable to the year 1986 it is understood that the total labor cost of each facility for the year 1986 shall not exceed the total reimbursement to be received by the subject facility pursuant to any reimbursement methodology that may be applicable at such time.)

The arbitrator's authority with respect to the period January 1, 1987—March 31, 1987 shall be limited and restricted in the same manner as above indicated for the year 1986.

The terms and conditions of paragraph "J" "Reimbursement Clause" are incorporated by reference herein as though the same were more fully set forth at length herein.

In the event the parties fail to reach agreement on the terms to be applicable in the third year of the contract and the parties submit to interest arbitration as hereinabove provided, it is agreed that the arbitrator shall give first priority to consideration of the employer's proposal for freezing the differential for evening and night personnel so that the differential shall be converted from a percentage to a dollar figure.

## B. SCHOLARSHIPS

The Signatory Facility shall establish, at its sole expense, a scholarship in the amount of One Thousand Dollars (\$1,000) the first year; One Thousand Two Hundred and Fifty Dollars (\$1,250) the second year of this Agreement, the recipient selected by a committee of representatives of the Union and Signatory Facility from children of bargaining unit employees.

### C. CASUAL EMPLOYEES

The parties agree to adhere to the provisions of paragraphs 6F.1 and 6F.2 of the Blue Collar agreement and 6D.1 and 6D.2 of the LPN and RN agreements which expired on March 31, 1984 (to the extent each such agreement shall apply at the said Signatory Facility).

Regular full-time employees are those whose names appear five (5) days per week on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, on such a schedule.

Regular part-time employees are those whose names appear fewer than five (5) days per week on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, on such a schedule.

Casual employees are those whose names do not appear on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, whose names do not appear on those schedules. No Signatory Facility in any given year shall engage casual employees where the number of hours worked by all casual employees exceeds the ratio of fifteen percent (15%) to the number of hours worked by regularly scheduled employees. Any casual employee who works in excess of eight hundred fifty (850) hours in any calendar year shall receive contractual benefits pro-rated to hours actually worked, except that contributions to the benefit funds shall not be pro-rated. During the first thirty (30) days worked by each casual employee, the casual employee will not accrue sick leave or vacation time. Accrual of such benefits will commence after thirty (30) days worked. It is the intention of the parties that casual employees shall not take the place of regularly scheduled employees on an ongoing basis and shall fill-in for regularly scheduled employees on holidays, personal days, vacation or other non-working benefit days, or in emergencies where the facility could not schedule in the normal course.

It is understood and agreed that the provisions of this "casuals" article shall be deemed controlling for any grievance pending, or which accrued, prior to April 1, 1984 concerning the status of "on calls" or "casuals" and that any such grievance shall be determined in accordance with the provisions of this "casuals" article. A committee consisting of one (1) representative designated by Southern New York and one (1) representative designated by the Union shall review "casual" or "on call" grievances outstanding as of this date with a view towards resolving same. The committee shall issue reports as it desires.

#### D. CREDIT UNION

Upon written authorization, employers shall deduct from the wages of covered employees voluntary contributions to the Local 144 SEIU Federal Credit Union.

#### E. NO STRIKE OR LOCKOUT

No employee shall engage in any strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer.

The Union, its officers, agents, representatives and members shall not in any way, directly or indirectly, authorize, assist, encourage, participate in or sanction any strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer, or ratify, condone or lend support to any such conduct or action.

In addition to any other liability, remedy or right provided by applicable law or statute, should a strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer occur, the Union shall immediately upon the request of the employer:

—publicly disavow such action by the employees;

—notify employees of its disapproval of such action and instruct such employees to cease such action and return to work at once.

The employer agrees that it will not lock out covered employees during the term of this Agreement.

#### F. SOILED LINEN, etc. COMMITTEE

A committee shall be established by the Union and the Association to explore and recommend additional modifications in the areas of soiled linen assignments, incontinent patients and safety.

#### G. LIFTERS

A mechanical lifting machine shall be provided in each Signatory Facility.

#### H. HOLIDAYS

Where a holiday falls on a Sunday, it shall be observed on the following Monday. Where the state and federal governments have established different days for the celebration of the same holiday, and where one of those days results in the holiday being celebrated on Monday and the other does not, the one which results in a Monday celebration shall be the one which is applicable hereunder.

#### I. INDUSTRY STANDARDS CLAUSE

The parties agree that employers whose levels of economic remuneration, benefits and conditions are less favorable to the employees than those contained herein shall be improved pursuant to schedules agreed to by the Union and the Association pertaining to the individual employer. The parties agree that it is their intention to accomplish industry standards among all Signatory Facilities, members of the Association, during the life of this Agreement. This provision shall not be subject to the arbitration clause of this Agreement.

## J. REIMBURSEMENT CLAUSE

The parties recognize and agree that each Signatory Facility must receive full reimbursement from the State of New York (and/or other government agencies concerned therewith) for all its labor costs in order to implement the economic terms and conditions of this Agreement.

Notwithstanding anything to the contrary contained in this Agreement, the implementation of the economic terms and conditions of this Agreement is subject to and conditioned upon the continued receipt of full reimbursement by each Signatory Facility from the State of New York (and/or other government agencies concerned therewith) for all its labor costs. Should any Signatory Facility not be fully reimbursed for all its labor costs, then it shall be entitled to a reduction in the labor costs and benefits described in this Agreement pursuant to procedures under the Reimbursement Review panel clause in an amount equal to the amount by which the State of New York (and/or other government agencies concerned therewith) fails to provide full reimbursement for all its labor costs.

The labor costs incurred under this Agreement have been negotiated with specific reference to the labor trend factor set forth by the State of New York in calculating reimbursement rates for long-term health care facilities in the State of New York. The State of New York has represented to the parties that the labor trend factor for 1984 is five and one-half percent ( $5\frac{1}{2}\%$ ), that the labor trend factor for 1985 is six percent ( $6\%$ ), and that the labor trend factor for 1986 is six percent ( $6\%$ ). Should the labor trend factor for each reimbursement year embraced in this Agreement (*i.e.*, 1984 or 1985 or 1986) be less than as represented by the State of New York—as a result of an initial reimbursement rate promulgation for each Signatory Facility or subsequent adjustment thereto—then, in such event, it shall be presumed that the Sig-



natory Facility has not been fully reimbursed and will be entitled to reductions hereunder. Should the percentage increase of any Signatory Facility of labor costs (calculated from the reimbursement base year to the applicable rate year) be in excess of the labor trend factor promulgated by the State of New York (calculated from the reimbursement base year to the applicable rate year) for such Signatory Facility—as a result of an initial reimbursement rate promulgation for each Signatory Facility or subsequent adjustment thereto—then it shall be presumed that the Signatory Facility has not been fully reimbursed and will be entitled to a reduction hereunder. Should the labor trend factor exceed that as represented by the State of New York by one percent (1%) or more, the parties may meet to negotiate the application of such additional reimbursement.

It is understood that the employer may increase wages and other benefits of non-bargaining unit employees during the period April 1, 1984 through March 31, 1987. To the extent that such increased wages and benefits are no greater than the increases in labor costs under the terms of this agreement, it is understood and agreed that these non-bargaining unit terms and conditions of employment must also be fully reimbursed by the State of New York.

This clause shall survive the term of this agreement.

#### K. REIMBURSEMENT REVIEW PANEL

—The Union and Southern New York hereby establish a Reimbursement Review Panel whose jurisdiction it shall be to hear and to determine all claims for relief or any questions arising out of or in connection with the reimbursement clause of this agreement. The Union shall appoint one (1) member of this Panel, the Association shall appoint one (1) member of this Panel, and the third member of of this Panel shall be The Honorable Eric J. Schmertz. Decisions by the Panel shall be by majority

vote. Mr. Schmertz shall serve as the Chairman and he shall have exclusive discretion to schedule matters coming before the Panel.

A Signatory Facility which makes a claim for relief under the reimbursement clause of the parties' agreement may invoke the jurisdiction of the Reimbursement Review Panel at any time after fifteen days' notice to the Union. The parties shall use said fifteen day notice period to meet and discuss settlement of the claim for relief. With the notice to the Union, the Facility shall provide to the Union a statement of the claim and the relief sought, and such documents related to the claim as are available. Any other documents upon which the Facility intends to support its claim will be provided no later than seven (7) days prior to the first hearing before the Panel. The Reimbursement Review Panel shall meet and issue an award within thirty (30) days of notification by the Signatory Facility that said Signatory Facility invokes the jurisdiction of the Panel. If the Panel fails to render a decision within that time for whatever reason (unless extended by mutual consent of the parties), the appointment of the Chairperson shall be terminated immediately and the Impartial Chairperson shall serve as the Panel Chairperson. A final award must be rendered within 30 days of the appointment of the substitute Chairperson. If no decision is rendered within said 30 day period, the employer may unilaterally implement, in whole or in part, the relief requested provided that no part of the delay is attributable to the employer. However, the decision, when ultimately rendered, shall have retroactive effect, provided that such retroactive effect shall not be for more than a period of sixty (60) days prior to the date the decision is rendered.

The award of this Panel shall be binding upon both parties as any arbitration award and may be enforced in accordance with Civil Practice Law and Rules, Article 75, the Federal Arbitration Act and Section 301, LMRA.

In the event that Mr. Schmertz is unable to serve as Chairman of the Reimbursement Review Panel, then the parties shall meet to select a mutually acceptable successor. In the event that the parties are unable to agree on such successor (within fifteen (15) days of notice by one party to the other of Mr. Schmertz's unavailability), then the Impartial Chairperson shall serve.

#### L. MOST FAVORED NATIONS CLAUSE

The Union, having committed itself to achieving better working conditions for all employees in the nursing home industry, represents that it intends to provide the same conditions for workers in all nursing homes with which it has collective bargaining agreements.

In the event the Union enters into any collective bargaining agreement, memorandum of agreement or stipulation of agreement on or after April 1, 1984 with a proprietary nursing home and/or residential health care facility in New York City that provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the Southern New York Signatory Facilities, except that this provision shall not apply:

- to an initial collective bargaining agreement with an employer or receiver;
- to renewals of prior agreements where time to reach industry standards is provided; or
- to agreements with insolvent employers.

#### M. ARBITRATION PROCEDURES

The arbitration procedures shall be modified so as to provide that:

1. All discharge and indefinite suspension grievances must be heard within thirty (30) days of submission to



the Impartial Chairperson. If he/she does not schedule a hearing to be held within thirty (30) days, the grievance shall be referred by the Impartial Chairperson to an alternate arbitrator from a panel to be named by the parties.

2. No adjournment of discharge and indefinite suspension grievances shall be granted for a period of more than two (2) weeks; no second adjournment shall be granted except in extraordinary circumstances.

#### O. UNIT CLARIFICATION PROCEEDINGS: UNFAIR LABOR PRACTICE CHARGES

There are presently pending before the various Regions of the National Labor Relations Board petitions filed by Signatory Facilities, members of the Association, for unit clarification of bargaining units represented by the Union. Within thirty (30) days of the execution of this Agreement, representatives of such Signatory Facilities shall meet and confer with representatives of the Union in an effort to resolve said outstanding unit clarification petitions, during which time the parties shall use their best efforts to adjourn any scheduled hearings. Failing agreement between the parties to resolve any outstanding unit clarification petition, said unit clarification petition shall then be processed in the normal course by the National Labor Relations Board. Immediately after the execution of this Agreement by a facility, the parties also agree to withdraw, with prejudice, any and all unfair labor practice charges now on file with the National Labor Relations Board against the Union or any Signatory Facility or Southern and not to initiate or reinstitute such charges, in words or substance, at any time in the future.

#### P. 1976 WELFARE FUND

Thirty percent (30%) forgiveness of 1976 Welfare Fund contributions pursuant to the attached memorandum.

## Q. NEW EMPLOYEES

Effective December 1, 1984, wage rates for newly hired employees shall be as follows:

Persons hired from December 1, 1984 through July 14, 1985:

The minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324.00) less \$10.00

Persons hired from July 15, 1985 through March 31, 1986:

The minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324.00)

Effective with the execution of this agreement, employees hired at less than the minimum prevailing rate for their classification pursuant to conditions posted in the facility shall be paid at the minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324), except that employees hired at less than the minimum prevailing rate for their classification pursuant to conditions posted in the facility shall have no claim for back pay and the Union shall not assert any claim in any forum.

All newly hired employees shall be eligible for all contract benefits, including wage increases as and when due under the contract. However, contributions to the Local 144 Southern Welfare Fund shall commence for ninety (90) days subsequent to the end of the thirty (30) day probationary period, if such is determined to be actuarially sound, with benefits to commence no later than the date on which the obligation to contribute commences.

Any person currently employed in a Local 144 facility or on leave of absence from same shall not be considered a new hire and shall be employed at the full prevailing rate as provided for herein.

## R. SEVERANCE PAY

A committee to study modifications to, funding of, and limitations upon severance pay shall be appointed—two (2) members each by the Union and Southern.

## S. SOUTHERN FUNDS

The Union and members of Southern shall establish a pension fund and a welfare fund to provide the same level of benefits as those provided by the Local 144—Greater New York Funds, i.e., the Local 144—Nursing Home Pension Fund, New York City Nursing Home—Local 144 Welfare Fund, and New York City Nursing Home—Local 144 Dental Account (“Local 144—Southern Funds”) as of April 1, 1984. There shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds. No employee shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds.

It is agreed that any facility becoming a member of Southern or authorized by Southern (“authorized contributions”) may contribute to the Local 144—Southern Funds, in lieu of the Local 144—Greater New York Funds, on the terms and conditions as set forth herein at any time prior to the commencement of the operation of the said Funds and at any time within sixty (60) days of the annual anniversary date of such operation, provided however: (1) that the said Funds provide the same level of benefits as those provided by the Local 144—Greater New York Funds, that there shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds, and that no employee shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds; and (2) that

the facility has then paid up all of its obligations to the Local 144—Greater New York Funds or made satisfactory arrangements to do so. In the event that the conditions set forth in the preceding sentence are met, the Union hereby covenants, represents and agrees that any residential health care facility desiring to contribute to the Local 144—Southern Funds, and so authorized by Southern, shall be entitled to do so on the terms and conditions hereof in lieu of contributing to the Local 144—Greater New York Funds.

*Carriers, Actuaries, Plan Consultants,  
Administrative Details*

Following execution of this Agreement, the parties shall continue to negotiate concerning (a) the selection of carriers, actuaries, plan consultants; and (b) administrative details of the Local 144—Southern Funds, including selection of administrators and designation of office space.

In the event the parties have not resolved these matters by December 30, 1984, then either party may submit its final proposal on selection of carriers, actuaries, plan consultants and administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space, to interest arbitration before the Honorable Eric J. Schmertz, on a last best offer, item by item basis. In this arbitration the arbitrator shall only have power to select one (1) of the two (2) proposals as to any particular issue. Under any circumstances, the arbitrator shall have no authority to alter contractually agreed-upon levels of contributions nor to vary the date on which the Local 144—Southern Pension Fund and Local 144—Southern Welfare Fund shall become operational, that determination being the sole and exclusive option of Southern.

The award of the arbitrator shall issue no later than February 15, 1985. Should the award not issue by that date, any subsequently issued award shall be void and of no effect.

Failing either agreement of the parties or the issuance of an arbitrator's award of February 15, 1985, Southern, in its sole and exclusive discretion, shall select carriers, actuaries, plan consultants and determine administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space.

The Local 144—Southern Funds shall become operational and begin to provide benefits as of March 1, 1985, unless Southern shall determine to delay such operational date up to and/or including September 1, 1985.

#### *Agreements and Declarations of Trust*

Following execution of this Agreement, the Union and Southern shall meet to negotiate the terms for agreements and declarations of trust for the Local 144—Southern Funds. It is understood and agreed that the Agreements and Declarations of Trust to be adopted shall in any event provide for Joint Trustees and for the adoption of carriers, actuaries, plan consultants and determination of administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space, as determined by the parties, by the arbitrator as set forth above, or by Southern if the arbitrator does not issue his award by February 15, 1985.

In the event the parties have not agreed on terms for the Agreements and Declarations of Trust by December 30, 1984 (other than those relating to the adoption of carriers, actuaries, plan consultants and determination of administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space), there shall be submitted to interest arbitration before the Honorable Eric J. Schmertz on a last best offer basis the question what the terms of such Agreements and Declarations of Trust should be. Such award shall issue no later than February 15, 1985.



It is understood and agreed that the Agreements and Declarations of Trust shall in any event provide that in the event of disputes among the Trustees concerning selection of carriers, actuaries, plan consultants and administrative details, including selection of administrator and designation of office space, there shall be deadlock arbitration.

If there shall be no arbitrator's award on the Agreements and Declarations of Trust issued by February 15, 1985, then Southern's proposed Agreements and Declarations of Trust shall become the parties' Agreements and Declarations of Trust. In the event there shall have been neither agreement on nor an arbitrator's award concerning selection of carriers, actuaries, plan consultants, etc., as set forth on page 19 hereof by February 15, 1985, the effective date of the Agreements shall be determined by Southern in its sole and exclusive discretion, it being understood that the Agreements shall become effective within five (5) days of the Local 144—Southern Funds becoming operational.

### *Contributions*

Members of Southern and authorized contributors shall make contributions to benefit funds on the following basis.

(a) Effective July 1, 1984, through and including two (2) months prior to the operational date of the Local 144—Southern Funds, nine and one-half percent ( $9\frac{1}{2}\%$ ) of the gross payroll to the Local 144—Greater New York Welfare Fund; four percent (4%) of the gross payroll to an escrow account to be maintained by counsel to the parties ("escrow account").

(b) Effective two (2) months prior to the operational date of the Local 144—Southern Funds, thirteen and one-half percent ( $13\frac{1}{2}\%$ ) of gross payroll to the escrow account, and no further contributions to the Local 144 Funds.

(c) Effective on the operational date of the Local 144—Southern Funds, nine and one-half percent ( $9\frac{1}{2}\%$ ) of gross payroll to the Local 144—Southern Welfare Fund and four percent (4%) of gross payroll to the Local 144—Southern Pension Fund. Effective December 1, 1985, increase of one percent (1%) of gross payroll to Local 144—Southern Welfare Fund. Effective January 1, 1986, increase of two percent (2%) of gross payroll to Local 144—Southern Pension Fund.

(d) Members of Southern and authorized contributors shall have no obligation to make or have made contributions to the Local 144—Greater New York Funds for the period January 1, 1984 through and including May 15, 1984 provided that it shall be a condition precedent to this provision that, with credit given for contributions made during that period, all contributions to those Funds otherwise required hereunder of a facility have been made for the calendar year 1984 by January 31, 1985. If such condition is not met by a contributing employer than that employer is not relieved of any obligations under the expired agreement or under this Agreement.

The Union has made a finding and determination that the Signatory Facility, party hereto, has met and satisfied this condition precedent. The Union shall not contest in any forum, by any manner, means, nature or description, the finding and determination that the Signatory Facility has met and satisfied this condition precedent nor shall the Union contest in any forum, of any nature or description, in any manner whatever, the availability of this moratoria provision to the Signatory Facility.

It is understood and agreed that a facility failing to satisfy the condition precedent set forth herein would be obliged, for the period April 1, 1984 through and including June 30, 1984, to contribute nine and one-half percent ( $9\frac{1}{2}\%$ ) of gross payroll to the Local 144—

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Greater New York Welfare Fund and four percent (4%) of gross payroll to the Local 144—Greater New York Pension Fund. However, because the Signatory Facility, party hereto, has satisfied the condition precedent and has no obligation to contribute to the Local 144—Greater New York Funds for the period January 1, 1984-May 15, 1984, it shall be obliged to contribute nine and one-half percent (9½%) of gross payroll to the Local 144—Greater New York Welfare Fund and four percent (4%) of gross payroll to the Local 144—Greater New York Pension Fund only for the period May 16, 1984 through and including June 30, 1984.

To the extent any member of Southern or authorized contributor may have made contributions to the Local 144—Greater New York Funds, for the period January 1, 1984 through and including May 15, 1984 and is entitled to be relieved of the obligation to have made them, such contributions shall be a credit against contributions due the Local 144—Greater New York Funds. Any credit due for contributions to the Local 144—Greater New York Funds to any member of Southern or authorized contributor may be transferred in whole or in part by such facility to any other facility, for any purpose whatever in connection with offsetting liabilities to the Local 144—Greater New York Funds. Any facility to which credit is transferred may use such credit to establish entitlement to be relieved of the obligation to make contributions from January 1, 1984 to May 15, 1984, as set forth in the first sentence of this subparagraph.

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(e) Under any circumstances, members of Southern and authorized contributors shall, effective July 1, 1984, have no obligation to make contributions on a current basis to the Local 144—Greater New York Funds except as specifically set forth herein.

(f) The escrow account referred to herein shall be maintained by counsel to the parties for the purpose of building reserves for the Local 144—Southern Funds.



In the event the parties shall have agreed upon carriers, actuaries, and plan consultants or an arbitrator's award issues by February 15, 1985 determining these matters, then the escrow account shall be released to the Trustees of the Local 144—Southern Funds on or before February 28, 1985. In the event that by February 28, 1985, the Union and Southern shall not have agreed upon carriers, actuaries and plan consultants and the designation of an administrator and selection of office space, or that no arbitrator's award shall have issued by February 15, 1985, then counsel shall, on the operational date as determined by Southern, release the escrow account to counsel for Southern who shall make payments from it necessary to commence operation of the Local 144—Southern Funds and thereafter transfer to the Trustees of the Local 144—Southern Funds the balance of the escrow account then remaining. In the event the Local 144—Southern Funds shall not have become operational by September 1, 1985, then and in that event counsel shall release the escrow account as soon as reasonably practicable but no later than November 30, 1985 to the Local 144—Greater New York Pension Fund, and effective as of September 1, 1985, the Employers shall make current contributions to that Fund in the amounts set forth herein, as well as make contributions, effective March 1, 1986 to the Local 144—Greater New York Educational Fund and Dental Account and continue to make contributions to the Local 144—Greater New York Welfare Fund, in the amounts provided for herein.

(g) Gross payroll for purposes of this Article shall be frozen at the payroll rates in effect on September 30, 1983 for the period April 1, 1984 through March 31, 1986. It is understood and agreed that gross payroll for contribution purposes shall not be defined to include days on which there is a strike or lock-out at a Signatory Facility, and that no contributions shall be due the Local 144—Greater New York Funds or the Local 144—Southern

Funds and/or the escrow account by any Signatory Facility for the period of a strike or lock-out.

#### *Dental and Educational*

Effective March 1, 1986 or such sooner time as Southern may determine, the Union and Southern shall establish a jointly-trusted Local 144—Southern Education Fund and add a Local 144—Southern Dental Account to the Local 144—Southern Welfare Fund. Contributions to the Local 144—Southern Dental Account and to the Local 144—Southern Education Fund to provide the same level of benefits as those provided by the Local 144 Health Facilities Training and Upgrading Fund shall commence as of March 1, 1986 at the rate of one percent (1%) of gross payroll to each. Gross payroll shall be frozen at the payroll rates in effect on September 30, 1983 for the period March 1, 1986 through March 31, 1986 for the purposes of contributions to the Dental Account and Education Fund. Administrative details of the Local 144—Southern Education Fund shall parallel those of the Local 144—Southern Pension and Local 144—Southern Welfare Funds. Any dispute as to the creation of that Fund shall be submitted to final and binding arbitration.

It is understood and agreed that the Local 144—Southern Welfare Fund created hereunder shall, on its operational date, provide dental benefits comparable to those provided as of April 1, 1984 by the Local 144—Greater New York Dental Account. In the event the provision of such dental coverage shall require contributions in excess of those agreed upon, the amount of such excess shall be a credit against future contributions otherwise due to the Local 144—Southern Dental Account or the Local 144—Southern Educational Fund, at the option of Southern.

#### *Litigation*

It is understood that members of Southern and authorized contributors may commence litigation against the Local 144—Greater New York Funds to obtain for

the Local 144—Southern Pension, Local 144—Southern Welfare and Local 144—Southern Education Funds and Local 144—Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to the contributions of members of Southern and authorized contributors, on the condition that upon receipt of such monies the Local 144—Southern Funds shall assume all liabilities of the Local 144—Greater New York Funds to employees of Southern members and/or authorized contributors. The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.

It is understood and agreed that as of the operational date of the Local 144—Southern Pension Fund, that the Local 144—Southern Pension Fund shall be established on a defined contribution basis with a target benefit of Three Hundred Fifty Dollars (\$350) per month. The Local 144—Southern Pension Fund shall be converted to a defined benefit plan as soon as practicable.

#### *Benefit Improvements*

Pension, dental and welfare benefits shall be increased, to the extent actuarially appropriate, and consistent with the agreed-upon contribution levels. It is intended that:

- (a) dental coverage be improved;
- (b) major medical insurance added; and
- (c) pension, benefits be increased to \$350.00 per month as of October, 1984; \$450.00 per month as of July, 1985; and \$500.00 per month as of January, 1986.

#### **T. DURATION**

This Agreement shall be effective for the period March 31, 1984 through and including March 31, 1987. It is

specifically understood and agreed that neither party hereto shall engage in economic action, including strikes or lock-outs, against the other, for a period of seventy (70) days after March 31, 1987, but shall instead meet to negotiate the terms of a new agreement. On and after seventy (70) days following March 31, 1987, neither party shall take economic action in connection with such negotiations except upon ten (10) days' notice.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers as of the day and year first above written.

LOCAL 144, HOTEL, HOSPITAL,  
NURSING HOME & ALLIED  
SERVICES UNION, SEIU,  
AFL-CIO

By: /s/ Peter Ottley

[Signatory Facility]

By: /s/ Jonathan Sulds  
On behalf of authorizing  
facilities, subject to  
ratification  
Robert Goldman

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing  
Home & Allied Services Union,  
SEIU, AFL-CIO  
233 West 49th Street  
New York, New York 10019

Gentlemen:

Reference is made to the Industry Standards Clause contained in the collective bargaining agreements entered into this day by and between the Union and Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc. In negotiating this clause, the parties have agreed that the Union shall take no action in any form, be it arbitral, judicial or administrative, to enforce the terms of said clause against any Signatory Facility and that the Union hereby waives any claims under such clause.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and  
CONFIRMED:

LOCAL 144, SEIU, AFL-CIO

By: /s/ Peter Ottley

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing  
Home & Allied Services Union,  
SEIU, AFL-CIO  
233 West 49th Street  
New York, New York 10019

Gentlemen:

Reference is made to paragraph II.A "Wage Increases" contained in the collective bargaining agreements entered into this day by and between the Union and the Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc. In negotiating this clause, the parties have agreed that payment of the wage increases shall be timely to the extent they are made as soon as practicable after reimbursement increases are received to fund such wage increases by each Signatory Facility.

If the foregoing conforms to your understanding, please confirm by your signature below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and  
CONFIRMED:

LOCAL 144, SEIU, AFL-CIO

By: /s/ Peter Ottley



Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing  
Home & Allied Services Union, SEIU,  
AFL-CIO  
233 West 49th Street  
New York, New York 10019

Gentlemen:

Supplementing the collective bargaining agreement entered into as of this date by and among the Union and the Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc., it is understood and agreed in connection with paragraph II.A.1 ("Wage Increases—Lump Sum") that such lump sum payments shall be made only to regular full and part-time employees employed by a Signatory Facility on April 1, 1984 and continuously thereafter until September 23, 1984. It is further understood and agreed that the amount of the lump sum payment payable to the regular part-time employees shall be pro-rated according to their frequency of work; *e.g.*, a three (3)-day a week regular part-time employee shall receive three-fifths (3/5) of the applicable lump sum payment.

If the foregoing conforms to your understanding, please confirm by your signature below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and  
CONFIRMED:

By: /s/ Peter Ottley

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing  
Home & Allied Services Union, SEIU,  
AFL-CIO  
233 West 49th Street  
New York, New York 10019

Gentlemen:

Reference is made to the Reimbursement Clause and the Reimbursement Review Panel Clause contained in the collective bargaining agreements entered into this day by and between the Union and Signatory Facilities, members of Southern New York Residential Health Care Association, Inc. In negotiating these clauses, the parties have agreed that wages which were in effect as of March 31, 1984 should, under no circumstances, be reduced by the Panel. Nor should other economic benefits, which were in effect as of March 31, 1984, be reduced unless and until the increases in wages and other economic benefits provided for in this agreement have been reduced by the Panel to the level in effect as of March 31, 1984.

The foregoing shall be the sole limit on the Panel's authority to reduce labor costs to meet reimbursement shortfall. However, in calculating the amount of reimbursement shortfall, the Panel shall take into account the funds moratoria only in the year given.

The parties further agree that the withdrawal during negotiations of the Union's proposal that the phrase "increased labor costs" be spelled out in paragraph two (2) of the Reimbursement Clause, shall be deemed to be of no significance in the application of said clause.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan L. Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and  
CONFIRMED:

LOCAL 144, SEIU, AFL-CIO

By: /s/ Peter Ottley

Southern New York Residential Health  
Care Facilities Association, Inc.  
21 West St.  
New York, New York 10017

Gentlemen:

Supplementing the collective bargaining agreement entered into this date by and between the Union and the Signatory Facility Member of Southern New York Residential Health Care Facilities Association, Inc. (Southern Association), it is agreed that the Union shall take no action by way of internal union discipline or otherwise against any individual who crossed a picket line or worked at a struck facility for the period September 24, 1984 to the effective date hereof.

Any disciplinary action taken by a Signatory Facility against an employee for strike lock-out conduct may be submitted to arbitration before the Impartial Chairperson. The parties agree that in the event the arbitrator finds that any of the employees terminated for such alleged misconduct is entitled to reinstatement, the arbitrator, in lieu of reinstatement to the facilities in which the grievant was employed, shall, upon request of the employer, direct that the grievant be reinstated to one of the other facilities of the Southern Association, provided however that the employee loses no seniority or other rights he has acquired with his original employer, that the original employer pay any backpay that is required under the award, and that the facility to which the employee would then be assigned is in geographic proximity to the one from which he was terminated. The employee shall be assigned to the same shift, same job classification, and receive the same pay.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and  
CONFIRMED:

SOUTHERN RESIDENTIAL HEALTH CARE  
FACILITIES ASSOCIATION, INC.

By: /s/ Peter Ottley

IT IS HEREBY STIPULATED AND AGREED by and between the Signatory Facility and Local 144, Hotel, Hospital, Nursing Home & Allied Services Union (hereinafter "Local 144") that subject to the provisions of this Stipulation the Signatory Facility if it has not already received it shall be and is entitled to a thirty (30%) percent forgiveness of said employer members' liability to the Local 144 New York City Nursing Home Welfare Fund (hereinafter "Welfare Fund") for the year 1976 which is defined as 30% of the total monies that a Signatory Facility was contractually obligated to remit to the Welfare Fund for the period January 1, 1976 through December 31, 1976 plus any interest accrued thereon which is claimed by the Funds.

1. As of sixty (60) days from the date of this Stipulation a Signatory Facility entitled to the "30% forgiveness" and which is claiming same is required to have remitted to the Welfare Fund seventy percent (70%) of its contractual liability to said Welfare Fund for the period January 1, 1976 through December 31, 1976 together with any interest accrued thereon;

2. A Signatory Facility wishing to take advantage of the "30% forgiveness" and which has an indebtedness to the Welfare Fund including the Dental Account and/or the New York City Nursing Home Local 144 Pension Fund, and/or the Local 144 New York City Nursing Home Training and Upgrading Fund for periods up to and including December 31, 1983 must execute within ninety days of the date of this agreement a payment agreement and confession of judgment for all undisputed amounts of said indebtedness less the "30% forgiveness" for said periods pursuant to the guidelines and resolutions promulgated by the Joint Board of Trustees of the "Welfare Fund", "Pension Fund", and "Education Fund";

3. Upon execution of the appropriate documents for the payment agreement and confession of judgment de-



scribed in paragraph "2" herein said Signatory Facility shall be deemed fully and irrevocably credited with the "30% forgiveness".

4. A Signatory Facility which has previously remitted to the "Welfare Fund" the "30% forgiveness" as well as the remainder of the contributions owed in 1976 to the "Welfare Fund" as determined by the "Welfare Fund" accounting office and has not been given credit for it shall be given an irrevocable credit of said amount subject to the conditions stated in this paragraph. In the event that such an employer has no indebtedness to the Funds for the period up to and including December 31, 1983, the Signatory Facility may take advantage of said credit by reducing other contributions to the "Welfare Fund" or transferring said credit to any Facility for offsetting liabilities to the Welfare Fund. Otherwise such credit can only be taken in the manner described in paragraphs "2" and "3".

5. A Signatory Facility currently under a payout agreement and confession of judgment for past indebtedness to the Funds, it shall be deemed to have complied with paragraphs "2" and "3" of this Stipulation and shall be entitled to an irrevocable credit (if not already received) in an amount equal to the "30% forgiveness" provided Signatory Facility has met all its obligations under such an agreement as of a date ninety days from the date of this Stipulation. Such a credit shall be first applied to any past indebtedness to the Funds over and above that covered by the payout agreement, second to meet any remaining obligations under the pay-out agreement and finally as an offset against current contributions over a three month period in equal installments.

6. Upon execution of the Stipulation the Signatory Facility shall withdraw the arbitration proceedings currently pending before Arbitrator Eric Schmertz with regard to the "30% forgiveness".

LOCAL 144, HOTL, (sic)  
HOSPITAL, NURSING HOME &  
ALLIED SERVICES UNION,  
SEIU, AFL-CIO

By: /s/ Peter Ottley

[Signatory Facility]

By: /s/ Jonathan Sulds  
On behalf of all authorized  
facilities, subject to  
ratification

**Exhibit B**

**Local 144—Southern New York Residential Health Care  
Facilities Association Pension Fund Trust Agreement,  
Dated October 18, 1985**

10/4/85

**LOCAL 144—SOUTHERN NEW YORK RESIDENTIAL  
HEALTH CARE FACILITIES ASSOCIATION PEN-  
SION FUND**

**AGREEMENT AND DECLARATION OF TRUST,**  
dated the 18 day of October, 1985, by, between and among  
Nicholas D. Demisay, Ernest Dicker, Abraham C. Gross-  
man, Jack Friedman, Peter Ottley, John Kelley, Austin  
Cedeno and Frank McKinney, constituting all of the Trus-  
tees of the Local 144—Southern New York Residential  
Health Care Facilities Association Pension Fund.

**WITNESSETH**

WHEREAS, Local 144, Hotel, Hospital, Nursing Home,  
and Allied Services Union, SEIU, AFL-CIO ("Local 144")  
on behalf of its members, and members of the Southern  
New York Residential Health Care Facilities Association,  
Inc. ("Southern Association") have entered into a collec-  
tive bargaining agreement which requires the establish-  
ment of a pension fund to provide pension benefits to em-  
ployees of such members of the Southern Association; and

WHEREAS, it is desired to create a pension fund as a  
trust fund for receiving contributions and for the payment  
of benefits to eligible participants and their beneficiaries;  
and

WHEREAS, it is desired to set forth the terms and  
conditions under which the Pension Fund is to be estab-  
lished, administered and maintained; and

WHEREAS, it is mutually agreed that the Pension Fund shall be administered in accordance with this Agreement and Declaration and Trust and it is desired to define the powers and duties of the Trustees;

NOW, THEREFORE, it is mutually understood and agreed as follows:

## *ARTICLE I*

### *DEFINITIONS*

Section 1. EMPLOYER. The term "Employer" means each employer who (a) is a member of the Southern Association and who is a signatory to a collective bargaining agreement with the Union calling for contributions to the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund, and (b) is not a member of the Southern Association but with whom the Union enters into a collective bargaining agreement calling for contributions to the Pension Fund, provided that the duly authorized approval of the members of the Southern Association is obtained. The term "Employer" shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. The term "Participant" as used herein means any Employee or former Employee as defined in the Plan of any Employer who is obligated to make contributions to the Pension Fund on behalf of an Employee who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. **TRUSTEES.** The term "Trustees" shall mean the Trustees named in and signatories to this Agreement and Declaration of Trust at the initial signing hereof and their respective successors designated and appointed in accordance with this Agreement and Declaration of Trust.

Section 5. **AGREEMENT AND DECLARATION OF TRUST.** The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modifications hereof and the trust created hereunder.

Section 6. **PENSION PLAN.** The term "Pension Plan" and "Plan" as used herein shall mean the employee benefit plan, program, method and procedure for the payment by the Trustees of pension benefits from the Trust Fund in accordance with such rules and regulations relating to eligibility requirements, including computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate. The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement.

Section 7. **CONTRIBUTIONS.** The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether pursuant to a collective bargaining agreement or other written agreements to which an Employer is a signatory for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. **PENSION FUND.** The term "Pension Fund" shall mean the "Local 144-Southern New York Residential Health Care Facilities Association Pension Fund."

Section 9. **TRUST FUND.** The term "Trust Fund" and "Trust" shall mean the contributions paid by Employers, together with all income, increments, earnings and

profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of the Trust Fund.

Section 10. **BENEFICIARY.** The term "Beneficiary" shall mean any person designated by a Participant or by the terms of the Pension Plan who is or may be entitled to a benefit thereunder.

Section 11. **INVESTMENT MANAGER.** "Investment Manager" shall mean any fiduciary other than a Trustee or named fiduciary having the power to manage, acquire or dispose of any asset of the Trust, and being a registered investment adviser under the Investment Advisers Act of 1940 or a bank defined in that act or an insurance company qualified to exercise said powers under the laws of more than one state of the United States, and has acknowledged in writing that he or it is a fiduciary with respect to the Plan.

Section 12. **ACT.** The term "Act" shall mean the Employee Retirement Income Security Act of 1974 and any amendments thereto, as well as those regulations promulgated from time to time pursuant thereto.

## *ARTICLE II*

### *NAME*

The Trust Fund shall be known as the "Local 144-Southern New York Residential Health Care Facilities Association Pension Fund", and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

## *ARTICLE III*

### *PURPOSES*

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Pension Plan formulated pursuant to the provisions of this Agreement and Declaration of



Trust, pension and disability benefits for Participants and, when provided, their Beneficiaries as herein defined and to pay the reasonable expenses of administering the Trust Fund and the Pension Plan and in collecting Contributions.

#### *ARTICLE IV*

##### *APPROVAL OF GOVERNMENTAL AGENCIES*

Section 1. The Pension Plan established pursuant to this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Act, and as qualifies for tax deductibility of the Contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Pension Plan and such other information and documents as may be required to the Internal Revenue Service for ruling as to the qualification the Pension Plan under the Internal Revenue Code and the exempt status of the Trust, and to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Act or other applicable law. In making such submissions, the Trustees shall provide, in and to the extent required by applicable law, representations on their behalf, and on behalf of Local 144 and the Employers as may be so required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Act.

#### *ARTICLE V*

##### *CONTRIBUTIONS TO THE TRUST FUND*

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Southern Association and those Employers who are signatories to a collective bar-

gaining agreement with the Union on behalf of Employees covered by the Pension Plan and shall be paid to the Trustees at regular intervals in accordance with said collective bargaining agreements and, if the collective bargaining agreement is silent, as the Trustees shall direct. Each Employer shall be responsible only for the Contributions payable by him on account of Employees covered by him, except as otherwise required by the Act.

Section 2. Each Employer shall promptly furnish to the Trustees or their authorized representatives on demand such payroll records and data with respect to Employees that the Trustees may require in connection with the administration of the Trust and the Pension Plan; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll records of each Employer with respect to Employees whenever the Trustees deem such examination advisable for the proper administration of the Trust.

### Section 3.

(a) In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees are hereby given the right, in their capacity as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy, for the purpose of effectuating the collection of Contributions due to the Fund from any Employer under the provisions of an applicable collective bargaining agreement or the Act. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages (as pro-

vided in the Act), interest at such rates as the Trustees shall from time to time determine, and the costs and legal fees incurred in such proceeding, to which the Fund is or may be entitled.

## *ARTICLE VI*

### *POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES*

Section 1. The Trustees may, among other things:

(a) Accept and receive all Contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more Investment Managers as herein provided.

(b) Formulate, adopt and administer a Pension Plan, subject to and in accordance with the definition of that term contained in Article I, for the exclusive benefit of the Participants and their beneficiaries in order to provide pension benefits for the Participants and their beneficiaries as and to the extent provided therein. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein and in the Plan.

(c) Promulgate and establish rules and regulations, and authorize the expenditure of monies from the Trust Fund, for the administration and operation of the Pension Plan in order to effectuate the purposes thereof including, without limitation, the payment of all amounts authorized under this Agreement to be paid from the Trust Fund, and in pursuance thereof formulate and establish the conditions of eligibility with respect to age and length of service, past and future service benefit credits, and method of providing pensions, the investment

of funds and any and all other matters which the Trustees, in their discretion, may deem necessary or proper to effectuate the purposes and intent of the Pension Plan provided the effect thereof does not impose on an Employer a liability for Contributions greater than that imposed under a collective bargaining agreement between such Employer and Local 144.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion, based upon actuarial or other financial data furnished to them with respect to the operation of the Pension Plan, deem necessary or advisable for the sound and efficient administration of the Pension Plan.

(e) Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and

(f) Enter into agreements, contracts and other instruments for the deposit of funds bearing a reasonable interest rate with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation and which accept and hold monies on deposit, and to authorize any such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) Enter into agreements, contracts and other instruments with banks and trust companies for the investment of funds delegating to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property.

(h) Acquire and maintain individual annuities, group annuities and life insurance policies (the "Contracts") with an insurance company or companies of reputable standing licensed to do business in the State of New York

as the Trustees determine to be advisable to accomplish the purposes of the Pension Plan, and to pay from the Trust Fund premiums, dues, charges and interest thereon. The Trustees shall collect and receive all dividends or other payments of any kind payable with respect to, under, or arising out of, any of the Contracts or leave the same with the issuing insurance company; to convert from one form of Contract to another form of Contract; to change the person or persons designated in any Contract to receive the proceeds and, without limitation, to exercise any and all of the rights, options or privileges that belong to the absolute owner of any of the Contracts held in the Trust Fund. Nothing contained herein shall require the Trustees to Purchase Contracts to secure benefits under the Pension Plan.

The Trustees may agree with any insurance company to any alteration, modification or amendment of a contract and take any action respecting such contract which is necessary or advisable, and such insurance company shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with a Contract. If the Trustees so agree with any insurance company, the Trustees, or any person or persons designated by them, may pass upon the validity of claims for benefits under a Contract and, in payment of claims in the amounts approved thereunder, may sign drafts upon the insurance company issuing the Contract.

(i) In their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims), may appoint an Investment Manager and may transfer to the Investment Manager all, or such part as they deem desirable, of the assets of the Fund for investment or re-investment.



The Trustees may enter into an agreement with the Investment Manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Act including, but not limited to, provisions relating to delegating to the Investment Manager authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the Investment Manager that it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the Investment Manager, and the authority of the Trustees to settle the accounts of the Investment Manager on behalf of all persons having an interest in the Fund.

Any such appointment or agreement shall be subject to termination by the Trustees upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the Investment Manager may authorize the Investment Manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the Investment Manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended, and is exempt under Section 501(a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect).

(j) Authorize withdrawals of monies from the account or accounts of the Trust Fund, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(k) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:



(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer or dispose of any securities or other property at any time held by them for cash or on credit; and convert or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the limitations herein contained. Any such sale, transfer, disposition conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances of any corporation, company or association, any of the securities of which may at any time be held hereunder; exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith; and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy securities held by the Trustees, and exercise by attorney in fact or in any other manner any other rights of whatsoever nature pertain-

ing to securities or any other property at any time held in the Trust Fund.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or necessary to accomplish the purposes of the Trust Fund and this Agreement.

(h) Borrow money from any and all types of recognized lending institutions, such as, banks and insurance companies, upon such terms and conditions as the Trustees may deem desirable and, for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in the Trust Fund.

(i) Authorize by resolution any two or more of the Trustees, at least one of whom shall be a Union-appointed Trustee and one of whom shall be an Employer-appointed Trustee, to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Enter into an agreement with one or more banks or trust companies for the purpose of paying benefits granted under the terms of the Pension Plan.

(k) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Pension Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any agent or employee appointed for this purpose by resolution of the Trustees. The Trustees may appoint by resolution a Fund

manager (an individual or organization) to perform administrative and such other duties as the Trustees may from time to time delegate by resolution. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an Investment Manager or Managers, as provided in Section 1(i) of Article VI.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Southern Association, and the Employers.

Section 5. Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with a receipt obtained therefor, or sent by prepaid first class mail, return receipt requested. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefor or if sent by prepaid first class mail.

Section 6. The expenses incurred in the collection of Contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. The Trustees may utilize facilities offered to them by the Union to collect Employer Contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interest of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or any collective bargaining agreement under which this Trust Agreement is maintained.

Section 8. Any fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant and may receive reimbursement of expenses properly and actually incurred in the performance of his duties with respect to the Trust or the Plan upon presentation of receipts and like evidence for such expenses. Such reasonable expenses shall include the cost incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Trust or the Plan other than for reimbursement of expenses actually and properly incurred.

## *ARTICLE VII*

### *ACCOUNTS, RECORDS AND AUDITING THEREOF*

Section 1. Any income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant or firm thereof as of the end of each fiscal year under the Plan or more often as the Trustees may determine, and shall engage the services of an enrolled actuary, subject to Article VI, Section 8, for the purposes of preparing all actuarial information and actuarial valuations required by law. A copy of this audit along with a Summary Plan Description, collective bargaining agreement, Trust

Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including Participants, Beneficiaries and Employers. These reports shall be available in the principal office of the Pension Fund and at such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all Participants and Employers.

The Trustees shall furnish to each Participant covered under the Plan and to each beneficiary receiving benefits under the Plan, a copy of the current Summary Plan Description and Annual Report as required by law and to each Employer, whether or not required by law. Upon written request of a Participant or Beneficiary receiving benefits under the Plan, the Trustees shall furnish any Participant or Beneficiary receiving benefits under the Plan, on payment of a reasonable charge therefor, a copy of the Summary Plan Description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request wage and employment records from Employers with respect to wages and employment and shall have the right to examine said wages and employment records through duly authorized representatives, including certified public accountants, for the purpose of ascertaining the correctness of the Contributions made by the Employer and the eligibility for benefits of Employees.

Section 4. The Trustees shall furnish to an Employer after completion of an audit pursuant to Article VII, Section 3 a written audit report within fifteen (15) days after the completion of the audit. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to dis-



cuss the audit. The Employer shall pay any delinquent amount mutually agreed upon in such a conference or the amount claimed by the Trustees to be delinquent if mutual agreement is not reached, within thirty (30) days from the date the conference is ended or within fifteen (15) days from receipt of the report if no conference is requested, with interest from the date payment was due at rates to be set from time to time by the Trustees, at published prevailing rates.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representative of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Fund. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Fund unless a delinquency is established in an amount in excess of \$500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit.

## *ARTICLE VIII*

### *CLAIMS AND INDIVIDUAL RATES*

Section 1. No Employer or Employee, or any person claiming by or through such Employee by reason of having been named a Beneficiary in a certificate or otherwise, shall have any right, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that Employees and their Beneficiaries shall have the right to such benefits as they are entitled to under the terms of the Plan.

Section 2. No Employee shall have the option to receive any part of an Employer's Contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or withdrawal from the Pension Plan through severance of employment or otherwise, except as required by the Act or as specifically authorized by the Trustees.



Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any Employee, Beneficiary or person claiming through such Employee or Beneficiary, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall not be used for purposes other than the exclusive benefit of Employees or their beneficiaries and as set forth in this Agreement and Declaration of Trust. No claim for a refund of a Contribution or other payment to the Fund by an Employer shall be allowed except as permitted by the Act and then only upon the basis of such evidence as the Trustees may require.

## *ARTICLE IX*

### *OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS*

Section 1. Each Trustee or other Plan fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Trust in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its Participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee and that Trustee commits a breach of fiduciary responsibility. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, said fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, provided that said fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in this Agreement and Declaration of Trust other than the power to manage or control the assets of a plan except for the power to appoint an Investment Manager.

Section 5. The Trustees shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed Investment Manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the Investment Manager's fiduciary responsibility with respect to the Plan), and shall be

under no obligation to invest or otherwise manage any assets of the Fund that are subject to the management of the Investment Manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to the Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of the Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Agreement and Declaration of Trust, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that a Trustee breached the fiduciary obligations set forth in the Act.

Section 10. With regard to every Article and Section of this Agreement and Declaration of Trust, it is ex-

pressly understood that the rights of individual fiduciaries under ERISA are not waived.

## *ARTICLE X*

### *APPOINTMENT, REMOVAL, VOTING RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES*

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated by the Union as Union-appointed Trustees, and the other four (4) of whom shall be designated by the Southern Association as Employer-appointed Trustees in accordance with procedures established by the Southern Association for this purpose. The Trustees, each for himself or herself, shall accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Agreement to act for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union, and any vacancy in Employer-designated Trustees shall be filled by appointment of the Southern Association, in accordance with procedures established by the Southern Association for this purpose. No vacancy or vacancies in the office of the Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of the Trust.

Section 3. The Union and the Southern Association may remove any of their respective appointees or appoint a successor appointee to act in place of such appointee at any time provided the party making any such removal simultaneously appoints a successor in his place. Notice signed by the President of the Union or the Southern Association, as the case may be, shall be given to the remaining Trustees by the Union or the Southern Associa-

tion of the removal of any Trustee appointed by such entity and of the appointment of any successor Trustee.

Section 4. Two (2) Union-appointed Trustees and two (2) Employer-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees, acting as one group, present at the meeting, and a majority of the Employer-appointed Trustees, acting as one group, present at the meeting.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees and to the Union or the Southern Association appointing such Trustee.

Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees designated by the Union. The other two Union-appointed Trustees shall be designated by the Executive Board of the Union. A letter of the President of the Union setting forth the name or names of the Union-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees designated by the Union as Union-appointed Trustees shall serve until removed or until their respective successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union shall serve as long as they continue to hold their respective offices in the Union.

The Trustees designated by the Southern Association as Employer-appointed Trustees shall serve until removed or their respective successors are duly appointed and designated by the Southern Association in accordance with procedures established for this purpose. A letter of the President of the Southern Association setting forth the name



or names of the Employer-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust.

Section 8. In the event of the resignation, completion of terms of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Southern Association, his successor Trustee shall be designated by the Southern Association in accordance with procedures established for this purpose and written notice thereof shall be filed by the President of the Southern Association with the remaining Trustees.

Section 9. Action by the Trustees may be taken by a written instrument without a meeting if signed by all of the Trustees then in office.

Section 10. The terms of office of the Chairperson and the Secretary of the Trust Fund shall be for one year. The Association President shall serve as Chairperson of the Trust Fund, and the Union President shall serve as Secretary of the Trust Fund for the initial year. Thereafter, the offices of the Chairperson and the Secretary of the Pension Trust Fund shall be rotated between the Union President and the Association President annually.

Section 11. The Chairman or the Secretary or any four (4) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and date thereof to each Trustee. Meetings shall be held at the offices of the Fund, the Administrator, if one is appointed, or at the offices of either the Union or the Southern Association, as specified in the notice. No meeting shall be held on a legal holiday under the laws of the State of New York or on a Friday after 2:00 o'clock p.m.,



or on a Saturday or Sunday or a religious holiday. Notice shall again be given of an adjournment of a meeting duly called.

Section 12. In the event the Trustees are unable to agree on an action within seven (7) days, after a meeting at which such action was considered, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and, in the event of failure of the Trustees to agree upon an impartial arbitrator within the seven (7) day period, the Union-appointed Trustee group or the Employer-appointed Trustee group may petition the American Arbitration Association, for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding. A judgment confirming the decision may be entered in any court of competent jurisdiction.

#### *ARTICLE XI*

##### *TERMINATION OF THE TRUST*

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purposes of this Agreement and the Pension Plan, or to meet the payments due or to become due under the Pension Plan to persons entitled to benefits thereunder;

(b) In the event there are no individuals living who can qualify as Participants or Beneficiaries under the Pension Plan;

(c) In the event that the Pension Benefit Guaranty Corporation institutes a proceeding to terminate the Plan under the provisions of the Act;

(d) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants under the Plan in the manner set forth in the Plan in full accordance with the Act, after making provision for payment by the Fund of any and all obligations of the Trust, including expenses preceding and identical to the termination and after a final audit has been made. Any assets of the Trust remaining after the satisfaction of all liabilities under the Plan to Participants and other Beneficiaries are required by the Act and payment or provision for the payment of the aforesaid obligation of the Trust shall be distributed in accordance with applicable law.

## *ARTICLE XII*

### *BONDING AND INSURANCE*

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 percent of the amount of funds handled by the person, or class of persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bonds may not be procured from any surety or other company, agent or broker in whose business operations the Plan or any party in interest has direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by the Act, to insure themselves, the Fund as well as Employees or agents of the Fund and cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any Employee, agent or designee of them or of the Fund, while engaged

in business for or on its behalf, provided that such insurance policy shall permit recourse against a Trustee or fiduciary as may be required by the Act. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Trustees shall at all times pay from the Trust Fund ~~such~~ premiums as may be required by the Pension Benefit Guaranty Corporation.

Section 4. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

### *ARTICLE XIII*

#### *EXECUTION AND INTERPRETATION*

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts, which together shall constitute one and the same document. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the Contributions provided for herein, a practical plan for pension benefits for Participants and their Beneficiaries, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction so as to defeat their primary purpose; such interpretation or construction shall be placed on this Agreement and Dec-

laration of Trust, as will assist in the functioning of the Plan for the benefit of Employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust or the Plan, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the Fund or the Plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply.

#### *ARTICLE XIV*

#### *AMENDMENTS*

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Employer-appointed Trustees and by the Union-appointed Trustees, provided that no such amendment shall be effective unless approved by the Union and the Association. No amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then exist-

ing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall change the manner of designation of Trustees or result in an unequal number of Employer-appointed Trustees and Union-appointed Trustees or change the provisions hereof with respect to quorums for meetings of the Trustees or the making of decisions by the Trustees at a meeting or by written instrument. No amendment shall reduce retroactively the vested benefits of any Participant, retired person or beneficiary as of the time the amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a Participant, pensioner or beneficiary as of the first plan year to which the amendment applies.

## *ARTICLE XV*

### *EFFECTIVE DATE*

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 18 day of October, 1985.

/s/ Peter Ottley, (L.S.)

/s/ John Kelley (L.S.)

/s/ A. Frank McKinney (L.S.)

/s/ Austin Ceden0 (L.S.)

/s/ Nicholas D. Demisay (L.S.)

/s/ Jack Friedman (L.S.)

/s/ Ernest Dicker (L.S.)

/s/ Abraham Grossman (L.S.)



**Exhibit C**

**Local 144—Southern New York Residential  
Health Care Facilities Association Welfare  
Fund Trust Agreement, dated  
October 18, 1985**

**LOCAL 144—SOUTHERN NEW YORK  
RESIDENTIAL HEALTH CARE FACILITIES  
ASSOCIATION WELFARE FUND**

**AGREEMENT AND DECLARATION OF TRUST,**  
dated the 18 day of October, 1985, by and among  
Nicholas D. Demisay, Ernest Dicker, Abraham C. Gross-  
man, Jack Friedman, Peter Ottley, John Kelley, Austin  
Cedeno, and Frank McKinney, constituting all of the  
Trustees of the Local 144—Southern New York Resi-  
dential Health Care Facilities Association Welfare Fund.

**WITNESSETH**

**WHEREAS,** Local 144, Hotel, Hospital, Nursing Home,  
and Allied Services Union, SEIU, AFL-CIO ("Local  
144") on behalf of its members, and members of the  
Southern New York Residential Health Care Facilities  
Association, Inc. ("Southern Association") have entered  
into a collective bargaining agreement which requires  
the establishment of a welfare fund to provide welfare  
benefits to employees of such members of the Southern  
Association; and

**WHEREAS,** it is desired to create a welfare fund as a  
trust fund for receiving contributions and for the pay-  
ment of benefits to eligible participants and their bene-  
ficiaries; and

**WHEREAS,** it is desired to set forth the terms and  
conditions under which the Welfare Fund is to be estab-  
lished, administered and maintained; and

**WHEREAS,** it is mutually agreed that the Welfare  
Fund shall be administered in accordance with this



Agreement and Declaration of Trust and it is desired to define the powers and duties of the Trustees;

NOW, THEREFORE, it is mutually understood and agreed as follows:

## *ARTICLE I*

### *DEFINITIONS*

Section 1. **EMPLOYER.** The term "Employer" means each employer who (a) is a member of the Southern Association and who is a signatory to a collective bargaining agreement with the Union calling for contributions to the Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund, and (b) is not a member of the Southern Association but with whom the Union enters into a collective bargaining agreement calling for contributions to the Welfare Fund, provided that the duly authorized approval of the members of the Southern Association is obtained. The term "Employer" shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds, make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. **EMPLOYEE.** The term "Employee" means any individual employed by an Employer.

Section 3. **PARTICIPANT.** The term "Participant" as used herein means any Employee or former Employee as defined in the Plan of any Employer who is obligated to make contributions to the Welfare Fund on behalf of an Employee who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. **TRUSTEES.** The term "Trustees" shall mean the Trustees named in and signatories to this Agreement and Declaration of Trust at the initial signing

hereof and their respective successors designated and appointed in accordance with this Agreement and Declaration of Trust.

**Section 5. AGREEMENT AND DECLARATION OF TRUST.** The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modifications hereof and the trust created hereunder.

**Section 6. WELFARE PLAN.** The term "Welfare Plan" and "Plan" as used herein shall mean the employee benefit plan, program, method and procedure for the payment by the Trustees of hospitalization, accident and sickness, disability, medical and surgical, optical, prescription, dental, life and accidental death and dismemberment benefits from the Trust Fund in accordance with such rules and regulations relating to eligibility requirements, including computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate. The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement.

**Section 7. CONTRIBUTIONS.** The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether pursuant to a collective bargaining agreement or other written agreements to which an Employer is a signatory for the purposes set forth in the Agreement and Declaration of Trust.

**Section 8. WELFARE FUND.** The term "Welfare Fund" shall mean the "Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund."

**Section 9. TRUST FUND.** The term "Trust Fund" and "Trust" shall mean the contributions paid by Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash,

credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of the Trust Fund.

Section 10. **BENEFICIARY.** The term "Beneficiary" shall mean any person designated by a Participant or by the terms of the Welfare Plan who is or may be entitled to a benefit thereunder.

Section 11. **INVESTMENT MANAGER.** "Investment Manager" shall mean any fiduciary other than a Trustee or named fiduciary having the power to manage, acquire or dispose of any asset of the Trust and being a registered investment adviser under the Investment Advisers Act of 1940 or a bank as defined in that act or an insurance company qualified to exercise said powers under the laws of more than one state of the United States, and has acknowledged in writing that he or it is a fiduciary with respect to the Plan.

Section 12. **ACT.** The term "Act" shall mean the Employee Retirement Income Security Act of 1974 and any amendments thereto, as well as those regulations promulgated from time to time pursuant thereto.

## *ARTICLE II*

### *NAME*

The Trust Fund shall be known as the "Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund", and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

## *ARTICLE III*

### *PURPOSES*

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Welfare Plan formulated pursuant to the provisions of this Agreement and Declaration of

Trust, hospitalization, accident and sickness, disability, medical and surgical, optical, prescription, dental, life and accidental death and dismemberment benefits for Participants and where provided, their Beneficiaries as herein defined and to pay the reasonable expenses of administering the Trust Fund and the Welfare Plan and in collecting Contributions.

#### *ARTICLE IV*

##### *APPROVAL OF GOVERNMENTAL AGENCIES*

Section 1. The Welfare Plan established pursuant to this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Act, and as qualifies for tax deductibility of the Contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Welfare Plan and such other information and documents as may be required to the Internal Revenue Service for ruling as to the qualification of the Welfare Plan under the Internal Revenue Code and the exempt status of the Trust, and to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Act or other applicable law. In making such submissions, the Trustees shall provide, in and to the extent required by applicable law, representations on their behalf, and on behalf of Local 144 and the Employers as may be so required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Act.

#### *ARTICLE V*

##### *CONTRIBUTIONS TO THE TRUST FUND*

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Southern Association

and those Employers who are signatories to a collective bargaining agreement with the Union on behalf of Employees covered by the Welfare Plan and shall be paid to the Trustees at regular intervals in accordance with said collective bargaining agreements and, if the collective bargaining agreement is silent, as the Trustees shall direct. Each Employer shall be responsible only for the Contributions payable by him on account of Employees covered by him, except as otherwise required by the Act.

Section 2. Each Employer shall promptly furnish to the Trustees or their authorized representatives on demand such payroll records and data with respect to Employees that the Trustees may require in connection with the administration of the Trust and the Welfare Plan; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll records of each Employer with respect to Employees whenever the Trustees deem such examination advisable for the proper administration of the Trust.

Section 3.

(a) In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees are hereby given the right, in their capacity as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy, for the purpose of effectuating the collection of Contributions due to the Fund from any Employer under the provisions of an applicable collective bargaining agreement or the Act. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages (as pro-



vided in the Act), interest at such rates as the Trustees shall from time to time determine, and the costs and legal fees incurred in such proceeding, to which the Fund is or may be entitled.

## *ARTICLE VI*

### *POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES*

Section 1. The Trustees may, among other things:

(a) Accept and receive all Contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more Investment Managers as herein provided.

(b) Formulate, adopt and administer a Welfare Plan, subject to and in accordance with the definition of that term contained in Article I. for the exclusive benefit of the Participants and their beneficiaries in order to provide welfare benefits for the Participants and their beneficiaries as and to the extent provided therein. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein and in the Plan.

(c) Promulgate and establish rules and regulations, and authorize the expenditure of monies from the Trust Fund, for the administration and operation of the Welfare Plan in order to effectuate the purposes thereof including, without limitation, the payment of all amounts authorized under this Agreement to be paid from the Trust Fund.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion, based upon actuarial or other financial data furnished to them



with respect to the operation of the Welfare Plan, deem necessary or advisable for the sound and efficient administration of the Welfare Plan.

(e) Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and

(f) Enter into agreements, contracts and other instruments for the deposit of funds bearing a reasonable interest rate with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation and which accept and hold monies on deposit, and to authorize any such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) Enter into agreements, contracts and other instruments with banks and trust companies for the investment of funds delegating to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property.

(h) Acquire and maintain group insurance policies (the "Contracts") with an insurance company or companies of reputable standing licensed to do business in the State of New York as to the extent the Trustees determine to be advisable to accomplish the purposes of the Welfare Plan, and to pay from the Trust Fund premiums, dues, charges and interest thereon. The Trustees shall collect and receive all dividends or other payments of any kind payable with respect to, under, or arising out of, any of the Contracts or leave the same with the issuing insurance company; to convert from one form of Contract to another form of Contract; to change the person or persons designated in any Contract to receive the proceeds and, without limitation, to exercise any and all of the

rights, options or privileges that belong to the absolute owner of any of the Contracts held in the Trust Fund. Nothing contained herein shall require the Trustees to purchase Contracts to secure benefits under the Welfare Plan.

The Trustees may agree with any insurance company to any alteration, modification or amendment of a Contract and take any action respecting such Contract which is necessary or advisable, and such insurance company shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with a Contract. If the Trustees so agree with any insurance company, the Trustees or any person or persons designated by them may pass upon the validity of claim for benefits under a Contract and, in payment of claims in the amounts approved thereunder, may sign drafts upon the insurance company issuing the Contract.

(i) In their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims), may appoint an Investment Manager and may transfer to the Investment Manager all, or such part as they deem desirable, of the assets of the Fund for investment or reinvestment.

The Trustees may enter into an agreement with the Investment Manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Act, including, but not limited to, provisions relating to delegating to the Investment Manager authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the Investment Manager that it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to

amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the Investment Manager on behalf of all persons having an interest in the Fund.

Any such appointment or agreement shall be subject to termination by the Trustees upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the Investment Manager may authorize the Investment Manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the Investment Manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended, and is exempt under Section 501(a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect).

(j) Authorize withdrawals of monies from the account or accounts of the Trust Fund, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(k) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer or dispose of any securities or other property at any time held by them for cash or on credit; and convert or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the

limitations herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances of any corporation, company or association, any of the securities of which may at any time be held hereunder; exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith; and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative accounting, actuarial, clerical, custodial and other assistants or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy securities held by the Trustees and exercise by attorney in fact or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held in the Trust Fund.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or necessary to accomplish the purpose of the Trust Fund and this Agreement.

(h) Borrow money from any and all types of recognized lending institutions, such as, banks and insurance com-

panies upon such terms and conditions as the Trustees may deem desirable and, for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in the Trust Fund.

(i) Authorize by resolution any two or more of the Trustees, at least one of whom shall be a Union-appointed Trustee and one of whom shall be an Employer-appointed Trustee, to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Enter into an agreement with one or more banks or trust companies or service organizations for the purpose of paying benefits granted under the terms of the Welfare Plan.

(k) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Welfare Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any agent or employee appointed for this purpose by resolution of the Trustees. The Trustees may appoint by resolution a Fund manager (an individual or organization) to perform administrative and such other duties as the Trustees may from time to time delegate by resolution. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the



Plan, other than the power to appoint an Investment Manager or Managers, as provided in Section 1(i) of Article VI.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Southern Association, and the Employers.

Section 5. Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with a receipt obtained therefor, or sent by prepaid first class mail, return receipt requested. Except as herein otherwise provided; distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefor or if sent by prepaid first class mail.

Section 6. The expenses incurred in the collection of Contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. The Trustees may utilize facilities offered to them by the Union to collect Employer Contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interest of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or any collective bargaining agreement under which this Trust Agreement is maintained.

Section 8. Any fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as



a participant and may receive reimbursement of expenses properly and actually incurred in the performance of his duties with respect to the Trust or the Plan upon presentation of receipts and like evidence for such expenses. Such reasonable expenses shall include the cost incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Trust or the Plan other than for reimbursement of expenses actually and properly incurred.

## *ARTICLE VII*

### *ACCOUNTS, RECORDS AND AUDITING THEREOF*

Section 1. Any income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant or firm thereof as of the end of each fiscal year under the Plan or more often as the Trustees may determine, and shall engage the services of an enrolled actuary, subject to Article VI, Section 8, for the purposes of preparing all actuarial information and actuarial valuations required by law. A copy of this audit along with a Summary Plan Description, collective bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including Participants, Beneficiaries and Employers. These reports shall be available in the principal office of the Fund and at such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all Participants and Employers.

The Trustees shall furnish to each Participant covered under the Plan and to each beneficiary receiving benefits under the Plan, a copy of the current Summary Plan Description and Annual Report as required by law and to each Employer, whether or not required by law. Upon written request of a Participant or Beneficiary receiving benefits under the Plan, the Trustees shall furnish any Participant or Beneficiary receiving benefits under the Plan, on payment of a reasonable charge therefor, a copy of the Summary Plan Description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request wage and employment records from Employers with respect to wages and employment and shall have the right to examine said wages and employment records through duly authorized representatives, including certified public accountants, for the purpose of ascertaining the correctness of the Contributions made by the Employer and the eligibility for benefits of Employees.

Section 4. The Trustees shall furnish to an Employer after completion of an audit pursuant to Article VII, Section 3 a written audit report within fifteen (15) days after the completion of the audit. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount mutually agreed upon in such a conference or the amount claimed by the Trustees to be delinquent if mutual agreement is not reached, within thirty (30) days from the date the conference is ended or within fifteen (15) days from receipt of the report if no conference is requested, with interest from the date payment was due at rates to be set from time to time by the Trustees, at published prevailing rates.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of

the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Fund. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Fund unless a delinquency is established in an amount in excess of \$500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit.

## *ARTICLE VIII*

### *CLAIMS AND INDIVIDUAL RIGHTS*

Section 1. No Employer or Employee, or any person claiming by or through such Employee by reason of having been named a Beneficiary in a certificate or otherwise, shall have any right, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that Employees and their Beneficiaries shall have the right to such benefits as they are entitled to under the terms of the Plan.

Section 2. No Employee shall have the option to receive any part of an Employer's Contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or withdrawal from the Welfare Plan through severance of employment or otherwise, except as required by the Act or as specifically authorized by the Trustees.

Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any Employee, Beneficiary or person claiming through such Employee or Beneficiary, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall not be used for purposes other than the exclusive benefit

of Employees or their beneficiaries and as set forth in this Agreement and Declaration of Trust. No claim for a refund of a Contribution or other payment to the Fund by an Employer shall be allowed except as permitted by the Act and then only upon the basis of such evidence as the Trustees may require.

*ARTICLE IX*  
*OBLIGATIONS AND LIABILITIES*  
*OF TRUSTEES AND OTHER PERSONS*

Section 1. Each Trustee or other Plan fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Trust in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its Participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee and that Trustee commits a breach of fiduci-

ary responsibility. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates responsibilities other than trustee responsibilities, said fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, provided that said fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in this Agreement and Declaration of Trust other than the power to manage or control the assets of a plan except for the power to appoint an Investment Manager.

Section 5. The Trustee shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed Investment Manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the Investment Manager's fiduciary responsibility with respect to the Plan), and shall be under no obligation to invest or otherwise manage any assets of the Fund that are subject to the management of the Investment Manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonably and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.



Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to the Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of the Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Agreement and Declaration of Trust, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that a Trustee breached the fiduciary obligations set forth in the Act.

Section 10. With regard to every Article and Section of this Agreement and Declaration of Trust, it is expressly understood that the rights of individual fiduciaries under ERISA are not waived.

## *ARTICLE X*

### *APPOINTMENT, REMOVAL, VOTING RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES*

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated by the Union as Union-appointed Trustees; and the other four (4) of whom



shall be designated by the Southern Association as Employer-appointed Trustees in accordance with procedures established by the Southern Association for this purpose. The Trustees, each for himself or herself, shall accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Agreement to act for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union, and any vacancy in Employer-designated Trustees shall be filled by appointment of the Southern Association, in accordance with procedures established by the Southern Association for this purpose. No vacancy or vacancies in the office of the Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of the Trust.

Section 3. The Union and the Southern Association may remove any of their respective appointees or appoint a successor appointee to act in place of such appointee at any time provided the party making any such removal simultaneously appoints a successor in his place. Notice signed by the President of the Union or the Southern Association, as the case may be, shall be given to the remaining Trustees by the Union or the Southern Association of the removal of any Trustee appointed by such entity and of the appointment of any successor Trustee.

Section 4. Two (2) Union-appointed Trustees and two (2) Employer-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees, acting as one group, present at the meeting, and a majority of the Employer-appointed Trustees, acting as one group, present at the meeting.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees and to the Union or the Southern Association appointing such Trustee.

Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees designated by the Union. The other two Union-appointed Trustees shall be designated by the Executive Board of the Union. A letter of the President of the Union setting forth the name or names of the Union-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees designated by the Union as Union-appointed Trustees shall serve until removed or until their respective successors are duly appointed and designated except that the President and Secretary-Treasurer of the union shall serve as long as they continue to hold their respective offices in the Union.

The Trustees designated by the Southern Association as Employer-appointed Trustees shall serve until removed or their respective successors are duly appointed and designated by the Southern Association in accordance with procedures established for this purpose. A letter of the President of the Southern Association setting forth the name or names of the Employer-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualifi-

cation, removal, disability or refusal to act of any Trustee designated by the Southern Association, a successor Trustee shall be designated by the Southern Association in accordance with procedures established for this purpose and written notice thereof shall be filed by the President of the Southern Association with the remaining Trustees.

Section 9. Action by the Trustees may be taken by a written instrument without a meeting if signed by all of the Trustees then in office.

Section 10. The terms of office of the Chairperson and the Secretary of the Trust Fund shall be for one year. The Union President shall serve as Chairperson of the Trust Fund, and the Association President shall serve as Secretary of the Trust Fund for the initial year. Thereafter, the offices of the Chairperson and the Secretary of the Welfare Trust Fund shall be rotated between the Union President and the Association President annually.

Section 11. The Chairman or the Secretary or any four (4) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and date thereof to each Trustee. Meetings shall be held at the offices of the Fund, the Administrator if one is appointed, or at the offices of either the Union or the Southern Association, as specified in the notice, or at another place with the unanimous written consent of the Trustees. No meeting shall be held on a legal holiday under the laws of the State of New York or on a Friday after 2:00 o'clock p.m. or on a Saturday or Sunday or a religious holiday. Notice shall again be given of an adjournment of a meeting duly called.

Section 12. In the event the Trustees are unable to agree on an action within seven (7) days after a meeting at which such action was considered, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and, in the event of failure of the

Trustees to agree upon an impartial arbitrator within the seven (7) day period, the Union-appointed Trustee group or the Employer-appointed Trustee group may petition the American Arbitration Association, for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding. A judgment confirming the decision may be entered in any court of competent jurisdiction.

## *ARTICLE XI*

### *TERMINATION OF THE TRUST*

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purposes of this Agreement and the Welfare Plan, or to meet the payments due or to become due under the Welfare Plan to persons entitled to benefits thereunder;

(b) In the event there are no individuals living who can qualify as Participants or Beneficiaries under the Welfare Plan; or

(c) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the Participants under the Plan in the manner set forth in the Plan in full accordance with the Act, after making provision for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made. Any assets of the Trust remaining after the satisfaction of all liabilities under the Plan to Participants and other Beneficiaries as required by the Act and

payment or provision of the payment of the aforesaid obligation of the Trust shall be distributed in accordance with applicable law.

## *ARTICLE XII*

### *BONDING AND INSURANCE*

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 percent of the amount of funds handled by the person, or class of persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bonds may not be procured from any surety or other company, agent or broker in whose business operations the Plan or any party in interest has direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by the Act, to insure themselves, the Fund as well as Employees or agents of the Fund and cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any Employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against a Trustee or fiduciary as may be required by the Act. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.



### ARTICLE XIII

#### EXECUTION AND INTERPRETATION

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts, which together shall constitute one and the same document. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the Contributions provided for herein, a practical plan for welfare benefits for Participants and their Beneficiaries, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction so as to defeat their primary purpose; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust or the Plan, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the Fund or the Plan; no Trustee or other



party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply.

#### *ARTICLE XIV* *AMENDMENTS*

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Employer-appointed Trustees and by the Union-appointed Trustees, provided that no such amendment shall be effective unless approved by the Union and the Association. No amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Welfare Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall change the manner of designation of Trustees or result in an unequal number of Employer-appointed Trustees and Union-appointed Trustees or change the provisions hereof with respect to quorums for meetings of the Trustees or the making of decisions by the Trustees at a meeting or by written instrument. No amendment shall reduce retroactively the vested benefits of any Participant, retired person or beneficiary as of the time the

amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a Participant, retired person or beneficiary as of the first plan year to which the amendment applies.

*ARTICLE XV*

*EFFECTIVE DATE*

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 18 day of October, 1985.

/s/ Peter Ottley (L.S.)

/s/ John Kelley (L.S.)

/s/ Frank McKinney (L.S.)

/s/ Austin Cedeno (L.S.)

/s/ Nicholas D. Demisay (L.S.)

/s/ Jack Friedman (L.S.)

/s/ Ernest Dicker (L.S.)

/s/ Abraham Grossman (L.S.)

**Exhibit D**

**Minutes of Trustees' Meeting of Southern New York  
Pension and Welfare Funds, dated October 18, 1985**

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**LOCAL 144—SOUTHERN NEW YORK  
PENSION & WELFARE FUNDS**

***MINUTES: TRUSTEES' MEETING***

October 18, 1985

The trust documents for the Pension and Welfare Funds were signed at approximately 12:15-12:30 p.m. Those trustees signing were: Nicholas Demisay, Ernest Dicker, Jack Friedman, Abraham Grossman, John Kelley, Frank McKinney, and Peter Ottley. Austin Cedenó was not present.

After signature, the First Trustees' Meeting was called to order.

***PRESENT:***

Nicholas Demisay, Trustee  
Ernest Dicker, Trustee  
Jack Friedman, Trustee  
Abraham Grossman, Trustee  
John Kelley, Trustee  
Frank McKinney, Trustee  
Peter Ottley, Trustee  
Howard B. Katz, Administrator  
Jonathan Sulds, Esq., Gibson, Dunn & Crutcher  
Harvey Weinberg, Esq., Shaw, Goldman, Licitra, Levine  
& Weinberg  
Jeremiah Riddle, Touche Ross & Co.  
Barbara Finn-Hammer, Touche Ross & Co.

Irwin Bluestein, Esq., Vladeck, Waldman, Elias &  
Engelhard  
Alan Brown, Esq., Local 144

Discussion held and agreement that December 1, 1985 was to be date Funds were to become operational.

Discussion held regarding the signature of Austin Ceden. Decided that Mr. Katz would call Mr. Ceden's office Monday to make an appointment for his signature. Once all documents are signed, copies of the executed agreement will be sent to:

Irwin Bluestein, Esq.  
Harvey Weinberg, Esq.  
Jonathan Sulds, Esq.

All other originals will be held by Mr. Katz at the Fund office. Photocopies will be sent to Ms. Finn-Hammer at Touche Ross & Co. for forwarding to HIP and Blue Cross.

Mr. Bluestein noted that the benefits of the dental coverage provided by Local 144 had increased as of October 1, 1985 as per the attached schedule. (Local 144 Funds Memorandum dated October 16, 1985). Discussion was held and agreed as to the order that Trustees' meetings will follow: Welfare Fund first, Pension Fund second.

Mr. Riddle presented the general aspects of investments of the Pension Funds as proposed by Mass Mutual for a defined contribution target benefit plan and explained the method of providing that no employee not yet vested under Local 144—Greater New York Fund would not lose any benefits upon transfer to this Fund.

Mr. Bluestein requested noting that the intent of the Pension Fund was to meet the monthly benefit of \$350/month at normal retirement either through the defined contribution target benefit plan, or a defined benefit plan. The employee-trustees group responded that this was their intent, first to try through the defined contribution benefit

target plan and upon failure of such, then the defined benefit plan.

In general discussion, it was decided to invite Mass Mutual and Aetna to present their respective plans.

Mr. Katz asked Mr. Riddle if new census data was needed. Mr. Riddle responded in the affirmative, as the census data was now six months old.

Discussion was then held as to the time, place, and agenda of the next Trustees' meeting. October 28, 1985 at 10:00 a.m. at the N.Y.U. Club was agreed upon.

The meeting was adjourned at 1:40 p.m. there being no further business.

Respectfully submitted,

\_\_\_\_\_  
Chairman (Welfare Fund)

\_\_\_\_\_  
Chairman (Pension Fund)

\_\_\_\_\_  
Secretary (Welfare Fund)

\_\_\_\_\_  
Secretary (Pension Fund)

**Exhibit E**

**Minutes of Trustees' Meeting of Southern New York  
Pension and Welfare Funds, dated November 5, 1985**

**LOCAL 144—SOUTHERN NEW YORK PENSION  
& WELFARE FUNDS**

**MINUTES: TRUSTEES' MEETING**

November 5, 1985

***PRESENT:***

Austin Cedeno, Trustee  
Nicholas Demisay, Trustee  
Ernest Dicker, Trustee  
Jack Friedman, Trustee  
Abraham Grossman, Trustee  
John Kelley, Trustee  
Frank McKinney, Trustee  
Peter Ottley, Trustee  
Howard B. Katz, Administrator  
Irwin Bluestein, Esq., Vladeck, Waldman,  
Elias & Engelhard  
Alan Brown, Esq., Counsel, Local 144  
Jonathan Sulds, Esq., Gibson, Dunn &  
Crutcher  
Harvey Weinberg Esq., Shaw, Goldman,  
Licitra, Levine & Weinberg  
Jeremiah Riddle, Touche, Ross & Co.  
Barbara Finn-Hammer, Touche, Ross & Co.

***1. Minutes of First Trustees' Meeting***

As the Trustees have adopted a Defined Benefit Pension Plan, Mr. Bluestein's paragraph was adopted and, therefore, the minutes of the first meeting.



## 2. *Minutes of Second Trustees' Meeting*

Adopted with a further definition of the activities located on 49th Street for covered employees. Those activities being dental, credit union, educational programs as well as union activities.

## 3. *Location of Fund Office*

General discussion regarding the investigation into the cost of breaking the lease at 240 West 35th Street. Decided to form a committee consisting of Mr. Demisay and Mr. McKinney to examine alternative sites and, if needed, to retain the services of a broker in order to conduct such search and cost of breaking lease. All locations are to be examined based upon cost, convenience, and availability.

## 4. *Employees of Fund—Clerical Position*

General discussion regarding the hiring of employees. Key employees will be interviewed by Mr. Cedenno and Mr. Dicker, all others by Mr. Katz.

Mr. Katz presented qualifications of Mr. Sidney Hull, who was later interviewed by the committee.

## 5. *Pension Fund—Type of Plan, Defined Contribution Target Vs. Defined Benefit.*

Mr. Riddle presented additional data on costs of guaranteeing those employees not yet fully vested under the Greater New York Pension Fund, who by joining this Fund would lose years of service credit.

Under Defined Contribution the supplemental guarantee would cost approximately \$40,000-\$80,000 per annum. Upon Defined Benefit \$20,000-\$40,000 per annum. Mr. Riddle thought that would be a good estimate.

Motion made by Mr. Cedenno for the Fund to adopt a Defined Benefit Pension Plan. Seconded by Mr. Demisay. Motion adopted. No nays. Noted that the language for

the minimum guaranteed benefit to be written as "For those not vested under Greater New York Pension Plan, full recognition of pension credits granted there under."

Touche Ross & Co. will have the responsibility to produce first draft of the Defined Benefit Pension Plan as adopted.

Discussion held regarding those employees having 10 years or more vesting in Greater New York Plan. It is clearly the intent of this Fund (Southern) that payment of benefit be apportioned dependent upon amount of service credits accumulated under each plan. An example of such, i.e., a person with 25 years combined service, 17 years in Greater New York, 8 years in Southern, Greater would be responsible for 17/25 of \$350 benefit or \$238, Southern responsible for 8/25 or \$112. (\$350 being the current maximum benefit). Formula could be stated as:

$$\begin{array}{rcl}
 \text{Normal pension rights} & \frac{\text{\# of years of service in}}{25} & \times 350 \quad + \\
 \text{of employee} & & \\
 & \frac{\text{\# of years of service credits in Local 144-Southern Fund}}{25} & \times 350 = \$350 \text{ monthly benefit}
 \end{array}$$

General discussion was then held regarding the accuracy of data from Greater New York Pension Fund as to years of service for each employee. Decided that when each employee petitions for benefit an individual research of that person's employment history would have to be made.

Motion made to skip to agenda item number 8, adopted, no nays.

#### 8. *Review of Blue Cross Coverage*

Ms. Finn-Hammer reported on progress in obtaining a rate quote from Blue Cross. Blue Cross wanted to ascer-

tain the legality and financial ability of Fund prior to giving rate.

Resolution adopted that all Trustees request that Blue Cross move forward in quoting new rate, but that such resolution did not reflect on Trustees' decision to contract with Blue Cross, and that such contract decision has not been made by the Trustees at this time. Resolution adopted, no nays.

The next Trustees' Meeting will be held on November 11 at 9:00 a.m. at the:

Office of Irwin Bluestein  
Vladeck, Waldman, Elias, Engelhard, P.C.  
1501 Broadway  
New York, N.Y. 10036

The agenda for the meeting will consist of those parts of the agenda tabled at today's meeting, specifically:

1. Review of investment policy of Trustees' regarding Mass Mutual and Aetna proposals.
2. Review of memorandum to employees advising them of benefits until detailed booklets are prepared.
3. Discussion fo (sic) treatment of the 9.5% contribution for August.
4. Escrow Fund—transition.

there being no further business, the meeting was adjourned at 12:45 p.m.

Respectfully submitted,

\_\_\_\_\_  
Chairman (Welfare Fund)

\_\_\_\_\_  
Chairman (Pension Fund)

\_\_\_\_\_  
Secretary (Welfare Fund)

\_\_\_\_\_  
Secretary (Pension Fund)

**Answer to Third Amended Complaint  
With Counterclaims**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**ANSWER TO THIRD AMENDED COMPLAINT**

Defendants, by their undersigned counsel, answer the third amended complaint (the "complaint") as follows:

1. Defendants admit that the complaint purports to state causes of action under 29 U.S.C. §§ 302, 1132 and 1451, to obtain a portion of the corpus of the defendants Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund (hereafter collectively referred to as the "Greater New York Funds" or "defendant Funds"), and purports to seek declaratory and injunctive relief in furtherance thereof. Defendants deny, however, that defendants or their agents have acted, or failed to act, in any way so as to give rise to any liability under the statutory provisions cited therein or to warrant the requested relief.

2. The allegations of paragraph 2 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

3. Defendants admit that Moses Unger and plaintiffs Abraham Grossman, Ernest Dicker, Nicholas Demisay and

Desdemona Jones Caruso were at certain times owners and operators of health care facilities. The allegations of paragraph 3 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Defendants admit that plaintiff Jack Friedman was an owner and operator of health care facilities. The allegations of paragraph 4 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

5. The allegations of paragraph 5 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that the plaintiffs named in paragraph 7 of the complaint were or are employees of any of the other plaintiffs, or participants in the plaintiffs Local 144—Southern New York Residential Health Care Facilities Association Pension Fund and/or the Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund (hereafter collectively referred to as the “Southern

Funds"). To the extent that said plaintiffs were employees of employers which have permanently ceased to have an obligation to contribute to the Greater New York Funds, any named plaintiffs who are employees have ceased to accrue benefits thereunder. However, if said plaintiffs are, or may become, eligible to receive a benefit from one or more of the Greater New York Funds, they are participants in said fund or funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7 of the complaint.

8. Defendants admit that the Greater New York Funds are jointly trustee, multiemployer trust funds and employee benefit plans, and that the location of the principal offices of the Greater New York Funds is in the County and State of New York. The remaining allegations of paragraph 8 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required.

9. Defendants admit the allegations contained in paragraph 9 of the complaint.

10. Defendants deny the allegations contained in paragraph 10 of the complaint.

11. Defendants admit that the Greater New York Funds are administered within this judicial district. The allegations of paragraph 11 of the complaint concerning the applicability of statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants deny the remaining allegations contained in paragraph 11 of the complaint.

12. Defendants admit that plaintiff Employers were members of the Greater New York Health Care Facilities Association, Inc. (the "Association") and were parties to the collective bargaining agreements between the Asso-



ciation and Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, AFL-CIO ("Local 144"). Defendants further admit that the aforesaid plaintiffs were contractually obliged to contribute, and made some contributions to the Greater New York Funds. Defendants deny that aforesaid plaintiffs made all contributions for which they were contractually obliged, and deny the remaining allegations contained in paragraph 12 of the complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Defendants admit that plaintiff Employers were contractually obliged and made some, but not necessarily all, required contributions to the Greater New York Funds. Defendants deny all remaining allegations contained in paragraph 14 of the complaint.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 15-20 of the complaint. To the extent that those paragraphs purport to describe, summarize or reproduce any provisions or requirements of that collective bargaining agreement, said agreement will speak for itself.

16. Defendants admit that they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto because they are not entitled to it. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and third sentences of paragraph 21 of the complaint. Defendants deny the remaining allegations contained in paragraph 21 of the complaint.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in the first sentence of paragraph 22 of the complaint. Defendants deny the remaining allegations contained in paragraph 22 of the complaint.

18. Defendants admit that certain entities named as plaintiff employers and or management companies ceased making contributions to the Greater New York Funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 23 of the complaint.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint.

20. To the extent that certain plaintiffs were employees of employers which have permanently ceased to have an obligation to contribute to the Greater New York Funds, any named plaintiffs who are employees have ceased to accrue benefits thereunder. However, if said plaintiffs are, or may become, eligible to receive a benefit from one or more of the Greater New York Funds, they are participants in said fund or funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 25 of the complaint.

21. In response to paragraph 26 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25 of the complaint as if fully set forth herein.

22. Defendants admit that the Greater New York Funds are jointly trustee funds established for the employees of employers who contribute thereto. Defendants are without knowledge or information sufficient to form a belief as to the allegations of paragraph 27 concerning the purpose of the Southern Funds. Defendants deny the remaining allegations contained in paragraph 27 of the complaint.

23. Defendants deny the allegations contained in paragraph 28 of the complaint.

24. Defendants are without knowledge or information sufficient to form a belief as to the allegations of paragraph 29 of the complaint, except that the defendants admit that the Greater New York Funds provides benefits to plaintiff employees and other similarly situated employees who are entitled to them.

25. Defendants admit that Greater New York Funds maintain reasonable reserves. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 30 of the complaint.

26. Defendants admit they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto, because they are not entitled to such funds. Defendants deny the remaining allegations contained in paragraph 31 of the complaint.

27. Defendants deny the allegations contained in paragraph 32 of the complaint.

28. Defendants admit that paragraph 33 seeks relief against certain of the defendants, but denies the allegations contained therein.

29. In response to paragraph 34 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25 and 27-31, as if fully set forth herein.

30. Defendants admit that certain of the defendants are trustees of the Greater New York Funds and administer those Funds solely in the interest of, and for the exclusive purpose of providing benefits to, the participants and beneficiaries of said Funds. The remaining allegations of paragraph 35 concerning the applicability of

certain statutory provisions cited therein constitute legal conclusions as to which no answer is required.

31. Defendants deny the allegations contained in paragraphs 36-38 of the complaint.

32. Defendants admit that paragraph 39 seeks relief against certain of the defendants, but deny the allegations contained therein.

33. In response to paragraph 40 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25, 27-31 and 35-37, as if fully set forth herein.

34. Defendants admit that the Greater New York Funds are jointly trustee multiemployer plans. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the Southern Funds. The remaining allegations of paragraph 41 of the complaint concerning the applicability of certain statutory provisions constitute legal conclusions as to which no answer is required.

35. Defendants deny the allegations of paragraphs 42-43 of the complaint.

36. Defendants admit that they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto, because they are not entitled to such funds. Defendants deny the remaining allegations contained in paragraph 44 of the complaint.

37. Defendants deny the allegation of paragraph 45 of the complaint.

38. Defendants deny all allegations of the complaint to the extent not heretofore admitted, denied, or otherwise responsively pleaded.

39. Defendants deny that plaintiffs are entitled to any of the relief demanded in paragraphs (1)-(4) of the WHEREFORE clause of the complaint.

*AFFIRMATIVE DEFENSES*  
*FIRST AFFIRMATIVE DEFENSE*

This Court has no jurisdiction over the subject matter of this action.

*SECOND AFFIRMATIVE DEFENSE*

The complaint fails to state a claim against the defendants upon which relief can be granted.

*THIRD AFFIRMATIVE DEFENSE*

Plaintiffs who are trustees of the Southern Funds and plaintiffs who are denoted in the complaint to be the "plaintiff Employers and/or management companies" lack standing to assert the First and Second Claims for Relief in this action.

*FOURTH AFFIRMATIVE DEFENSE*

All of the plaintiffs lack standing to assert the Third Claim for Relief in this action.

*FIFTH AFFIRMATIVE DEFENSE*

The transfer of assets from the Local 144 Nursing Home Pension Fund sought by plaintiffs in this action is barred by Federal statute.

*SIXTH AFFIRMATIVE DEFENSE*

None of the defendants has any financial or other obligation to plaintiffs except to the extent that plaintiffs may be entitled to benefits as participants of the Greater New York Funds.

*SEVENTH AFFIRMATIVE DEFENSE*

Any loss or losses allegedly suffered by any of the plaintiffs were not caused by the defendants, or by anyone for whom any of the defendants is responsible, but instead by the plaintiffs and/or their agents.

### *EIGHTH AFFIRMATIVE DEFENSE*

This action is barred by the equitable doctrines of laches, estoppel and waiver.

### *NINTH AFFIRMATIVE DEFENSE*

This action is barred by the applicable statutes of limitations.

### *TENTH AFFIRMATIVE DEFENSE*

At all times complained of herein, all conduct of the defendants was reasonable, lawful, and in good faith.

### *FIRST COUNTERCLAIM*

1. This counterclaim is brought by the defendants Greater New York Funds against the plaintiffs American Nursing Home, Bruckner Nursing Home, Williamsburg Manor Nursing Home, Clearview Nursing Home, Seacrest Nursing Home, Shoreview Nursing Home, Clove Lakes Nursing Home, Fieldston Lodge Nursing Home, Freidwald House HRF, and Lyden Nursing Home (the "Employer Nursing Homes"), and B.N.H. Management Associates, Inc., Wald Management Associates, Inc. and 801 190th Street Management Associates, Inc. (the "Management Companies"), to the extent any of the Management Companies are asserted or deemed to be responsible for any of the obligations of any of the Employer Nursing Homes for delinquent contributions which, pursuant to 29 U.S.C. § 1145, said Employer Nursing Homes were required to make to the Greater New York Funds pursuant to the terms of the plan instruments, trust agreements, collective bargaining agreements and other instruments ("plan documents") under which the funds were established and are operated. This Court has jurisdiction of this counterclaim under 29 U.S.C. § 1132(e) and 29 U.S.C. § 185.



2. The Greater New York Funds are, as alleged in paragraph 3 of the complaint, jointly-trusted labor-management, multiemployer trust funds and employer benefit plans.
3. The Employer Nursing Homes and Management Companies were obligated to make contributions to the Greater New York Funds under the terms of the applicable plan documents.
4. As of September 30, 1985, the Employer Nursing Homes and Management Companies have failed to make substantial contributions to the Greater New York Funds and are delinquent in making such contributions to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund as have been determined and confirmed to be delinquent by an audit of employer records, and further are delinquent in making contributions to the Local 144 Health Facilities Training and Upgrading Fund. In the aggregate, the Employer Nursing Homes and Management Companies have failed to make over \$1 million in contributions to the Greater New York Funds which the Employer Nursing Homes and Management Companies were obliged to make through September 30, 1985.
5. Pursuant to 29 U.S.C. § 1132(g) (2), the Greater New York Funds are entitled to: (A) the unpaid contributions; (B) interest on the unpaid contributions; (C) an amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132(g) (2) (C) (ii); (D) reasonable attorneys' fees and the costs of the action; and (E) such other legal or equitable relief as the Court deems appropriate.
6. Pursuant to the terms of the plan documents, the Greater New York Funds should be awarded the costs of audits of the Employer Nursing Homes and 12 percent interest on the delinquent contributions.

*SECOND COUNTERCLAIM*

1. This counterclaim is brought by the defendants Greater New York Funds against the plaintiffs Fort Tryon Nursing Home ("Fort Tryon") and Franklin Nursing Home ("Franklin") for an order requiring said plaintiffs to allow the defendants to examine Fort Tryon's and Franklin's records to determine the amounts of unpaid contributions due and owing from them to the defendants Greater New York Funds. This Court has jurisdiction of this counterclaim under 29 U.S.C. § 1132(e) and 29 U.S.C. § 185.

2. The Greater New York Funds are, as alleged in paragraph 3 of the complaint, jointly-trusteed labor-management, multiemployer trust funds and employee benefit plans.

3. The plaintiffs Fort Tryon Nursing Home and Franklin Nursing Home were required to make contributions to the defendants Greater New York Funds and are otherwise obligated to the terms of the plan documents under which the defendant Funds were established and are operated.

4. Under the said plan documents, the defendant Funds and their Trustees have the right to examine records of Fort Tryon and Franklin to determine the amounts of unpaid contributions due and owing from them to defendant Funds.

5. Pursuant to said plan documents, the defendant Funds attempted to examine the records of Fort Tryon and Franklin who have refused to allow such examinations.

6. Pursuant to the plan documents, 29 U.S.C. § 1132 (a) (3), and 29 U.S.C. § 1132(g), the Greater New York Funds asserted in the Second Counterclaim of their Answer to the Second Amended Complaint that they were entitled to (A) an order requiring Fort Tryon and Franklin to cooperate in good faith with an examination

of their records by the defendant Greater New York Funds; (B) reimbursement for the expense of such audits; (C) the unpaid contributions; (D) 12 percent interest on the unpaid contributions; (E) an additional amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132; (F) reasonable attorneys' fees and the costs of this action; and (G) such other legal or equitable relief as the court deems appropriate.

7. Plaintiffs defaulted in response to the defendants' Second Counterclaim.

8. Following plaintiffs' default, Greater New York Funds audited the records of Fort Tryon and Franklin and concluded that those employers have failed to make all required contributions.-

9. Pursuant to the plan documents, 29 U.S.C. § 1132 (a) (3), and 29 U.S.C. § 1132 (g), the Greater New York Funds are now entitled to (A) reimbursement for the expense of the aforementioned audits; (B) the unpaid contributions; (C) 12 percent interest on the unpaid contributions; (D) an additional amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132; (E) reasonable attorneys' fees and the costs of this action; and (F) such other legal or equitable relief as the court deems appropriate.

WHEREFORE, the defendants respectfully submit that this Court should (1) dismiss the plaintiffs' third amended complaint in its entirety, (2) should enter judgment in the defendants' favor on their first counterclaim against the plaintiff Employer Nursing Homes for delinquent contributions, and award the Greater New York Funds the unpaid contributions, 12 percent interest thereon, the greater of such interest or liquidated damages computed pursuant to 29 U.S.C. § 1132 (g) (2) (C) (ii), costs of the audits, costs and attorneys' fees, and

such other relief as this Court deems appropriate, and (3) should enter judgment in the defendants' favor on their second counterclaim against plaintiffs Fort Tryon and Franklin, awarding the Greater New York Funds the unpaid contributions, 12 percent interest thereon, the greater of such interest or liquidated damages computed pursuant to 29 U.S.C. § 1132(g)(2)(C)(ii), costs of the audits of Fort Tryon and Franklin, costs and attorneys' fees, and such other relief as this Court deems appropriate.

Dated: December 18, 1986

Respectfully submitted,

EPSTEIN BECKER BORSODY  
& GREEN, P.C.

By: /s/ Henry Rose  
HENRY ROSE  
250 Park Avenue  
New York, New York 10177-0077  
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By: /s/ Harry N. Turk  
HARRY N. TURK  
250 Park Avenue  
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(212) 370-9800  
Attorneys for Defendants

**Plaintiffs' Notice of Motion for Partial Summary Judgment****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**NOTICE OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that upon the third amended complaint herein; the annexed Statement Pursuant to Local Rule 3(g); the annexed Plaintiffs' First Request for Admission of Facts and Defendants' Admission thereto; the accompanying Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment; the supporting affidavit of Jonathan L. Sulds, Esq.; and the other papers and proceedings heretofore had herein, plaintiffs pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, will move this Court before the Honorable John E. Sprizzo, U.S.D.J., in Room 129, United States Courthouse, Foley Square, New York, New York 10007, on the 25th day of September, 1987, at 10:00 A.M., or as soon thereafter as counsel can be heard, for partial summary judgment ordering and directing defendants to account to the plaintiffs for all transactions by, and all assets and liabilities of the defendant Local 144, Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund ("Greater Funds"); ordering and directing defendants to transfer to the Local 144—Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds") that sum of money which the Court shall determine represents the portion of the Greater Funds' reserves attributable to contribu-

tions made by the plaintiff Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities plus interest thereon; enjoining and restraining defendant trustees from continuing to administer the Greater Funds in a discriminatory manner; declaring that defendant trustees breached their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104(a)(1)(A) by so administering the Greater Funds; declaring that defendant trustees also breached their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104(a)(1)(D) by administering the plan in accordance with an instrument inconsistent with the requirements of 29 U.S.C. § 1414; ordering and directing defendant trustees to adopt asset transfer rules in compliance with 29 U.S.C. § 1414; and granting such other and further relief as may be just and proper.

Dated: New York, New York  
April 10, 1987

Yours, etc.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds  
JONATHAN L. SULDS  
9 West 57th Street  
New York, New York 10019  
(212) 906-7900  
Attorneys for Plaintiffs



**Plaintiffs' Statement Pursuant to Local Rule 3(g)****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**STATEMENT PURSUANT TO LOCAL RULE 3(g)**

Plaintiffs, by their attorneys Gibson, Dunn & Crutcher, in support of their motion for partial summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, as to defendants' liability on all three of their causes of action, state the following facts as to which there are no genuine issues to be tried:

1. The Local 144-Nursing Home Pension Fund and the New York City Nursing Home-Local 144 Welfare Fund ("Greater Funds") are, and at all times material hereto were, jointly-trusted, multiemployer trust funds, and multiemployer benefit plans. (Answer ¶ 8.)

2. The Local 144-Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds") are, and at all times material hereto were, jointly trustee multiemployer trust funds and multiemployer benefit plans. (Complaint ¶ 2.)

3. In accordance with their collective bargaining agreements with Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO ("Local 144"), the plaintiff Employers and Management Companies (as defined in the Third Amended Complaint) made contributions at various times relevant hereto to the Greater Funds on behalf of their covered employees including the plaintiff Employees ("Employees"). (Sulds Affidavit ¶¶ 3-4, 10; Answer ¶¶ 12 & 14.)

4. The Greater Funds possess reserves that are derived, in part, from contributions received from the Employers and or Management Companies on behalf of their employees, including the plaintiff Employees. (Answer ¶ 25; Admission ¶ 2.)

5. On or about December 1, 1985, the Greater Welfare Fund ceased providing welfare coverage to the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 3.)

6. On or about July 1, 1984, the Greater Pension Fund ceased accruing pension service credits for the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 4.)

7. The Greater Funds' reserves are not now being used nor will they be used, to pay or provide benefits, or to produce income that may be used to pay or provide benefits to or for the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 5.)

8. The Greater Funds have not made a transfer to the Southern Funds of any portion of their reserves. (Answer ¶¶ 16, 26, 36.)

9. The transfer of the Employees' pension and welfare coverage from the Greater Funds to the Southern Funds resulted solely from the individual collective bargaining agreements negotiated between Local 144 and the Employers and Management Companies. (Sulds Affidavit ¶¶ 5-9.)

10. Neither the Greater Pension Fund nor the Greater Welfare Fund has adopted asset transfer rules in accordance with 29 U.S.C. § 1414 as part of its governing plan document or instrument. (Admission ¶¶ 6-7.)

11. The defendant trustees of the Greater Funds have administered those multiemployer benefit plans in accordance with the governing document or instrument

which does not contain asset transfer rules. (Admission ¶¶ 6-7.)

12. On or about December 1, 1985, the Southern Welfare Fund assumed the obligation to provide welfare coverage, in accordance with the terms of its trust agreement and plan document, to the employees of the Employers and Management Companies including plaintiff Employees. (Sulds Affidavit ¶ 15.)

13. On or about December 1, 1985, the Southern Pension Fund assumed the obligation to accrue pension service credits and pay pension benefits, in accordance with terms of its trust agreement and plan document, to the employees of the Employers and Management Companies including the plaintiff Employees. (Sulds Affidavit ¶ 15.)

14. On or about November 5, 1985, the Southern Pension Fund agreed to recognize fully all years of credited service earned under the Greater Pension Fund by those employees of the Employers and Management Companies who did not vest under the Greater Pension Fund prior to the transfer of their coverage to the Southern Pension Fund. (Sulds Affidavit ¶ 13.)

15. On or about November 5, 1985, the Southern Pension Fund agreed to recognize, for purposes of future accruals of credited service, the years of credited service earned under the Greater Pension Fund by those employees of the Employers and Management Companies who vested under the Greater Pension Fund prior to the transfer of their coverage to the Southern Pension Fund and on the basis thereof to pay a pro rata share of such employees' ultimate pension benefit based upon a ratio of their years of credited service under the Southern Pension Fund to their total years of credited service under both the Greater and Southern Pension Funds. (Sulds Affidavit ¶ 14.)

16. The plaintiffs have been unable to effectuate a transfer of any portion of the Greater Funds' reserves

to the Southern Funds in connection with the Southern Funds assumption of certain liabilities of the Greater Funds because of the defendants failure to adopt asset transfer rules in accordance with 29 U.S.C. § 1414. (Sulds Affidavit ¶ 16; Admission ¶¶ 6-7.)

DATED: New York, New York  
April 10, 1987

Yours, etc.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds  
JONATHAN L. SULDS  
9 West 57th Street  
New York, New York 10019  
(212) 906-7900  
Attorneys for Plaintiffs

Of Counsel:

Jonathan L. Sulds  
David J. Reilly

**Plaintiffs' First Request for Admission of Facts and  
Defendants' Admission Thereto**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**PLAINTIFFS' FIRST REQUEST FOR  
ADMISSION OF FACTS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, plaintiffs request that defendants within 30 days after service of this request admit or deny, for purposes of this action only, the truth of the following facts:

1. The reserves of the Local 144, Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund (hereinafter collectively referred to as the "Greater Funds") referred to in Paragraph 25 of the defendants' Answer to the Third Amended Complaint ("Answer"), are derived from the contributions of contributing employers and or the income therefrom.

2. The reserves of the Greater Funds referred to in paragraph 25 of the Answer are derived, in part, from contributions received from the plaintiff Employers and or Management Companies on behalf of their participant employees and or the income therefrom.

3. On or about December 1, 1985, the Greater Welfare Fund ceased providing welfare coverage to the employee participants of the plaintiff Employers and or Management Companies.

4. The employee participants of the plaintiff Employers and or Management Companies did not accrue pension credits under the Greater New York Pension Fund during the period April 1, 1984 through May 15, 1984 and ceased accruing such pension credits on or about July 1, 1984.

5. The reserves of the Greater Funds referred to in paragraph 25 of the Answer are not now being used to pay or provide benefits, or to produce income that may be used to pay or provide benefits, to or for employees of the plaintiff Employers and or Management Companies, who previously were paid or provided benefits by the Greater Funds.

6. The Greater Welfare Fund has not adopted asset-transfer rules under 29 U.S.C. § 1414.

7. The Greater Pension Fund has not adopted asset-transfer rules under 29 U.S.C. § 1414.

Dated: New York, New York  
February 11, 1987

GIBSON, DUNN & CRUTCHER

• By: /s/ David J. Reilly  
DAVID J. REILLY  
9 West 57th Street  
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(212) 906-7900

Attorneys for Plaintiffs,  
Counterclaim Defendants



EPSTEIN BECKER BORSODY & GREEN, P.C.  
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March 19, 1987

David J. Reilly, Esq.  
Gibson, Dunn & Crutcher  
9 West 57th Street  
New York, New York 10019

Re: Nicholas Demisay, et al. v. Local 144 Nursing  
Home Pension Fund, et al., 85 Civ. 6133 (JES)

Dear David:

Without admitting the relevance of the admissions to the referenced action, this is to advise you that the statements in Plaintiffs' First Request for Admission of Facts are admitted.

Sincerely,

/s/ Henry Rose  
HENRY ROSE

HR:cb

**Affidavit of Jonathan Sulds in Support of Motion**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**AFFIDAVIT**

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF NEW YORK    )

JONATHAN L. SULDS, being duly sworn deposes and says:

1. I am a member of the firm of Gibson, Dunn & Crutcher, attorneys for the plaintiffs in this action, and I make this affidavit in support of the plaintiffs' motion for partial summary judgment, on personal knowledge.

2. The plaintiffs in this action include: the management trustees of the Local 144—Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Management Trustees"); the present or former employers of those employees who are now participants in the Southern Funds and who are or were participants in the Local 144—Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund ("Employers" or "Management Companies"); and the named employees of the Employers and Management Companies ("Employees").

3. Until in or about 1981, the Employers were all members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York")—a multi-employer bargaining association—and thereby were parties

to the collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO ("Local 144"). Under those agreements, the Employers were contractually obliged to contribute, and did contribute to the Greater Funds on behalf of all of their employees covered by those agreements, including plaintiff Employees.

4. Upon withdrawing from Greater New York in or about 1981, the Employers negotiated and executed individual collective bargaining agreements with Local 144. Until November of 1984, each Employer, pursuant to its individual collective bargaining agreement with Local 144, was contractually obliged to, and did contribute to the Greater Funds on behalf of all of their employees covered by those agreements, including plaintiff Employees.

5. In or about February 1984, B.N.H. Management Associates, Inc. ("B.N.H.") and the other Employers each entered into negotiations with Local 144 for new individual collective bargaining agreements. One of the key goals that each of these employers sought to accomplish, and which they ultimately achieved in these negotiations, was the establishment of their own employee pension and welfare funds—the Southern Funds.

6. As the principal spokesperson for each employer in these 1984 negotiations, I had numerous discussions with both Peter Ottley, Local 144 President, and counsel for Local 144, regarding the establishment of the Southern Funds. We spoke at length concerning the actuarial soundness of the proposed Southern Funds, including the necessity for fund reserves. In this regard, I advised Mr. Ottley and counsel on several occasions that it was my belief that once the Southern Funds became operational, the Greater Funds would be obligated to transfer to the Southern Funds that portion of its reserves attributable to contributions made by the Employers and B.N.H. All of us recognized that the Greater Funds possessed such reserves as they were then, and continue to be, substan-

tially overfunded. As to the basis for the transfer of a share of these reserves to the Southern Funds, I specifically explained that it was compelled by LMRA Section 302(c)(5), which provides that an employer's contributions to a jointly trustee employee benefit fund must be used for the sole and exclusive benefit of the employees of such employer. I referred Mr. Ottley and counsel to *Local 50, Bakery & Confectionery Workers Union, Welfare Fund v. Local 3, Bakery & Confectionery Workers Union, Welfare Fund*, 773 F.2d 229 (2d Cir. 1984), a case in which the Second Circuit on facts very similar to this case compelled such a transfer between benefit funds pursuant to Section 302(c)(5) and (e).

7. On this basis, the parties agreed, pursuant to the collective bargaining agreements they executed on November 30, 1984, to establish the Southern Funds. (A copy of one such collective bargaining agreement containing the identical "Southern Funds Section" appearing in each agreement is attached hereto as Exhibit A.) More particularly, in each of these collective bargaining agreements, Local 144 expressly consented to the bringing of this action in the event that the Greater Funds refused to make a voluntary *pro rata* transfer of its reserves to the Southern Funds. Specifically, Southern Funds Section provides in relevant part:

#### *Litigation*

It is understood that members of Southern [New York Residential Health Care Facilities Association, Inc. ("Southern New York") (*i.e.*, Employers and B.N.H. Management Associates, Inc.)] and authorized contributors may commence litigation against the Local 144—Greater New York Funds to obtain for the Local 144—Southern Pension, Local 144—Southern Welfare and Local 144—Southern Education Fund and Local 144—Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to contributions of members of

Southern and authorized contributors, on the condition that upon receipt of such monies the Local 144—Southern Funds shall assume all liabilities of the Local 144—Greater New York Funds to employees of Southern members and/or authorized contributors. *The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.*

8. Mr. Ottley also made clear on several occasions during the negotiations that it was absolutely critical to the establishment of the Southern Funds that Local 144 be assured that its members would receive the same level of benefits as provided by the Greater Funds. In addition, he wanted a commitment that employees whose coverage was to be transferred to the Southern Funds would lose nothing as a result thereof. For this reason, the Southern Funds Section of each agreement expressly requires that the Southern Funds grant benefit levels equal to those of the Greater Funds. This section further specifies:

“There shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds. No employees shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds.”

9. This desire by Local 144 to prevent any disparity in the benefit levels of the Greater and Southern Funds also motivated its consent to the “Litigation” provision, quoted in Paragraph 7, *supra*, authorizing the commencement of this action. I had explained, and Mr. Ottley agreed, that the risk of the Southern Funds incurring a deficit and being forced thereby to reduce benefit levels

would be substantially reduced, if not eliminated, if the Southern Funds had available the reserves generated by the prior contributions paid to the Greater Funds on behalf of the Southern Funds' participants.

10. The Southern Funds Section also provides that each signatory employer shall continue to contribute the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. (Exhibit A.) In accordance with this provision, the Employers and/or Management Companies made contributions to the Greater Welfare Fund on behalf of their covered employees, including the plaintiff Employees.

11. On or about October 18, 1985, valid and lawful trust agreements were executed establishing the Southern Funds. True and correct copies of those trust arrangements are attached hereto as Exhibits B and C.

12. On that same date, at a duly constituted meeting thereof, the board of trustees of the Southern Funds agreed that the Southern Funds would become operational on December 1, 1985. A true and correct copy of the minutes of this meeting is attached hereto as Exhibit D.

13. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, agreed that the Southern Pension Fund would fully recognize all years of credited service earned under the Greater Pension Fund by those participants who had not vested under the Greater Pension Fund prior to the transfer of coverage. Thus, for example, an employee with nine years credited service under the Greater Pension Fund who retires after participating in the Southern Pension Fund for one year is deemed vested under the Southern Pension Funds' ten-year service requirement and receives a monthly benefit from the Southern Pension Fund based on ten years of service. A true and correct copy of the minutes of this meeting is attached hereto as Exhibit E.



14. As to those employees who vested under the Greater Pension Fund before commencing participation in the Southern Funds, the Southern Pension Fund has agreed to provide a pro rata portion of their ultimate pension benefit. Such payment shall be based on a ratio of their number of years of service under the Southern Pension Fund to their total combined service credit under both the Greater and Southern Pension Funds. For example, an employee who retires with a total of twenty-five years of service, eight of which represent credited service under the Southern Pension Fund, shall receive eight/twenty-fifths of his/her total benefit from the Southern Pension Fund. (See Exhibit E.)

15. On December 1, 1985, the Southern Funds became operational, providing coverage to the approximate 1,981 employees of the plaintiff Employers and Management companies.

16. During the first fifteen months of the Southern Funds' operation, the problem that the Employers, Management Companies and Local 144 sought to guard against by recognizing the validity of a transfer of reserves from the Greater Funds to the Southern Funds—funding shortfalls and the attendant possibility of a reduction in benefits—has come to pass. Although the Southern Welfare Fund was established with a contribution rate actuarially computed to satisfy expenses, it has incurred costs in excess of the contributions paid to it. Thus, once the reserves with which this fund was established are exhausted, which has nearly occurred, it may be forced to reduce benefit levels or increase contribution rates, unless the Greater Funds satisfy their statutory obligations and make the requested transfer of a portion of their reserves to the Southern Funds.

/s/ Jonathan L. Sulds  
JONATHAN L. SULDS

(Notarization Omitted in Printing)

Exhibit A—Representative Agreement between Local 144 and Southern Association Member, dated November 30, 1984

(omitted here but printed at p. 17)

Exhibit B—Local 144—Southern New York Residential Health Care Facilities Association Pension Fund Trust Agreement, dated October 18, 1985

(omitted here but printed at p. 49)

Exhibit C—Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund Trust Agreement, dated October 18, 1985

(omitted here but printed at p. 76)

Exhibit D—Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated October 18, 1985

(omitted here but printed at p. 103)

Exhibit E—Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated November 5, 1985

(omitted here but printed at p. 106)

**Defendants' Statement Pursuant to Local Rule 3(g)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**STATEMENT PURSUANT TO LOCAL RULE 3(g)**

Defendants, by their attorneys Epstein Becker Barsody & Green, in support of their motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on all of plaintiffs' causes of action, state the following facts as to which there are no genuine issues to be tried:

1. Provisions of trust documents governing the New York City Nursing Home Local 144 Welfare Fund, the Local 144 Nursing Home Pension Fund, and the Local 144 Health Facilities Training And Upgrading Fund ("Greater New York Funds") require that Fund assets be used only to pay benefits to which employees are entitled under the terms of the applicable welfare or pension benefit plan. Exhibit A, Affidavit of Neil Fiddleman ("Fiddleman Affidavit"), dated June 8, 1987.

2. No instance of payment by any of the Greater New York Funds to an employer upon withdrawal from participation has been identified. Exhibit C, Affidavit of A. H. Higgs, Jr. ("Higgs Affidavit"), dated June 8, 1987, at 7.

3. Plaintiff Employers were obligated by collective bargaining agreements to contribute to the Greater New York Funds certain percentages of the wages earned by their employees in work covered by the Greater New York Funds until November, 1984. Exhibit B, Affidavit

of Peter Ottley ("Ottley Affidavit"), dated June 8, 1987, Attachments I and II at 21-28; Affidavit of Jonathan Sulds ("Sulds Affidavit"), submitted by Plaintiffs, dated April 10, 1987, at 2.

4. Contribution rates to the Funds were not affected by the actual value of benefits provided to the employees of a particular employer. Exhibit C, Higgs Affidavit at 1-2.

5. The Greater New York Funds have not attempted to determine the value of benefits provided to the employees of any employer. Exhibit D, Affidavit of William Boseski ("Boseski Affidavit"), dated June 8, 1987, at 2.

6. In negotiations between plaintiff employers and Local 144 leading to the collective bargaining agreements executed on November 30, 1984, Local 144's President and chief negotiator, Peter Ottley, did not agree that the funding necessary to allow proposed new funds ("Southern Funds") to provide benefits equal to those provided under the Greater New York Funds would be reliant on, or contingent to, Southern Employer efforts to obtain assets from the Greater New York Funds. Ottley Affidavit, p. 3-5.

7. The plaintiff Employers made a direct contractual commitment to guarantee that Southern employees would be held harmless from any lowering of benefits that would otherwise result from the Employers' withdrawal from the Greater New York Funds and the creation of the new Southern Funds. Exhibit B, Ottley Affidavit at 2-5; Sulds Affidavit, Exhibit A.

8. Pursuant to terms of the November 30, 1984 contract, pension contributions by Southern Employers for the period beginning July 1, 1984 were to be placed in escrow for "the purpose of building reserves for the Local 144 Southern Funds" until the Southern Pension Fund came into operation. Two months of welfare payments were to be paid to an escrow account for the Southern

Welfare Fund while the Greater New York Welfare Fund was continuing to provide benefits, pursuant to plan provisions. Sulds Affidavit, Exhibit A; Fiddleman Affidavit, Attachment VI at 6-7.

9. The Greater New York Funds have taken no action to transfer Greater New York Funds liabilities to the Southern Funds. Plaintiffs Response to Defendants' First Set of Interrogatories and Request for Production of Documents No. 14.

10. No participant or beneficiary has lost benefits to which he was entitled under the Greater New York Funds. Plaintiffs' Response to Defendants' First Set of Interrogatories and Request for Production of Documents No. 10; Deposition of Yvonne Fernicola, 3/31/87 at p. 15; Deposition of Edward Wizner, 3/31/87 at p. 13; Deposition of Martha Mulligan, 3/31/87 at p. 20 and Deposition of Anita Harris, 3/31/87 at p. 17.

11. In addition, plaintiffs stated facts in its statement pursuant to Local 3(g) dated April 10, 1987, and except as noted in defendants' response, there are no genuine issues to be tried regarding those facts.

Dated: June 10, 1987

New York, New York

Respectfully submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: /s/ Henry Rose  
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By: /s/ Harry N. Turk  
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(212) 370-9800  
Attorneys for the Defendants  
and Intervener



**Defendants' Response to Plaintiffs' Statement  
Pursuant to Local Rule 3(g)**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**RESPONSE TO PLAINTIFFS' STATEMENT  
PURSUANT TO LOCAL RULE 3(g)**

Defendants, by their attorneys Epstein Becker Borsody & Green, in response to Plaintiffs' Statement Pursuant to Local Rule 3(g) in Support of Plaintiffs' Motion for Partial Summary Judgment dated April 10, 1987, state the material facts alleged by plaintiffs as to which there exist a genuine issue to be tried:

1. Plaintiffs' Statement No. 12. This statement refers to coverage in accordance with the terms of the Southern Welfare Fund plan document. In plaintiffs' Response dated February 10, 1987 to defendants' First Set of Interrogatories and Request for Production of Documents ("Interrogatory"), plaintiffs admit that no plan document then existed, and no document has been supplied thereafter to defendants.

2. Plaintiffs' Statement No. 13. Contrary to the statement that the Southern Pension Fund assumed obligations in accordance with terms of its plan document, plaintiffs' Response to Defendants' Interrogatory No. 11 admits that no plan document then existed, and none has been supplied thereafter to defendants.

3. Plaintiffs' Statement No. 16. This statement contains an implicit statement of law, in that plaintiffs allege that the reason they have been unable to effectuate a transfer of any portion of the Greater New York Funds' assets to the Southern Funds is the failure of the Greater New York Funds to adopt asset transfer rules in accordance with 29 U.S.C. § 1414. As a matter of law, even if the Greater New York Funds were to adopt such asset transfer rules, which they are not required to do at this time, application of those rules would not result in the payment of assets from the Greater New York Funds to the Southern Funds.

Dated: June 10, 1987  
New York, New York

Respectfully submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: /s/ Henry Rose  
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Attorneys for Defendants  
and Intervener

**Defendants' Memorandum of Points and Authorities in  
Opposition to Plaintiffs' Motion for Partial Summary  
Judgment and in Support of Defendants' Motion for  
Summary Judgment—Exhibits**

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**DEFENDANTS' MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
IN SUPPORT OF DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**EXHIBITS**

— Exhibit A

Affidavit of Neil Fiddleman

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Titile Omitted in Printing)

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**AFFIDAVIT OF NEIL FIDDLEMAN**

STATE OF NEW YORK       )  
COUNTY OF NEW YORK    ) ss.:

NEIL FIDDLEMAN, being duly sworn, deposes and says:

1. I am the Fund Manager of the New York City Nursing Home—Local 144 Welfare Fund, the Local 144—Nursing Home Pension Fund, and the Local 144 Health Facilities Training and Upgrading Fund ("Greater New York Funds").

2. The attached documents, marked Attachments 1-3 respectively, are true and correct copies of the Trust Agreements establishing the Greater New York Funds: Agreement and Declaration of Trust dated June 26, 1958, establishing the New York City Nursing Home Local 144 Welfare Fund, Agreement and Declaration of Trust dated December 12, 1963, establishing the Local 144—Nursing Home Pension Fund, and Agreement and Declaration of Trust dated September 22, 1976, establishing the Local 144 Health Facilities Training and Upgrading Fund.

3. The attached documents marked Attachments 4 and 5 respectively are true and correct copies of the Amended and Restated Trust Agreements of the New York City Nursing Home—Local 144 Welfare Fund dated December 15, 1975 and the Local 144—Nursing Home Pension Fund, also dated December 15, 1975. These are the currently effective Trust Agreements for these Funds.

4. True and correct copies of the title page and pages 6-7 of Welfare Fund Group Insurance Plan booklet are attached as Attachment 6. The provisions on "Termination of Insurance" were in force in 1985 when a group of employers ceased to contribute to the Welfare fund.

5. A true and correct copy of the Local 144 Nursing Home Pension Plan, Amended through January 1, 1986, is attached as Attachment 7. The benefit formula, in particular the Reduced Pension provisions of Section 3.03 of this Plan, is unchanged from the previous Pension Plan.

/s/ Neil Fiddleman  
NEIL FIDDLEMAN

(Notarization Omitted in Printing)

**Exhibit IV**

**Amended Welfare Trust Agreement of New York City  
Nursing Home—Local 144 Welfare Fund,  
dated December 15, 1975**

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**NEW YORK CITY NURSING HOME—  
LOCAL 144 WELFARE FUND**

**AGREEMENT AND DECLARATION OF TRUST**

AGREEMENT dated the 15th day of December, 1975, by, between and among John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Lichtman, constituting all of the Trustees of the New York City Nursing Home—Local 144 Welfare Fund (hereinafter referred to as the "Trustees"),

**WITNESSETH**

WHEREAS, by Agreement and Declaration of Trust dated as of June 26, 1958, Local 144, Hotel Front Service Employees' Union, AFL-CIO, Nursing Home Division (hereinafter referred to as the "Union"), the New York City Nursing Home Association, Inc., (hereinafter referred to as the "Association"), and Peter Ottley, Peter Byrne, Raymond McMichael, Robert Kaufmann and Howard Adler, the then Trustees, established a trust for the purpose of providing welfare benefits to employees of the Association's members who were represented by the Union which was thereafter amended from time to time; and

WHEREAS, the said Agreement and Declaration of Trust, as amended, provides that the same may be amended by unanimous vote of all the Trustees; and

WHEREAS, John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee



Lichtman now constitute the Truste (sic) of the said New York City Nursing Home—Local 144 Welfare Fund; and

WHEREAS, the Trustees desire to further amend the Agreement and Declaration of Trust as hereinafter set forth,

NOW, THEREFORE, the Agreement and Declaration of Trust is hereby amended and restated to provide as follows:

## ARTICLE I

### DEFINITIONS

Section 1. EMPLOYER. The term "Employer" shall mean each Employer who (a) is a member of the Association whose employees are covered by any collective bargaining agreement existing between the Union and the Association, and (b) is not a member of the Association but with whom the Union enters into a collective bargaining agreement. The term "Employer" shall also mean for the purpose of this Agreement, the Union and any affiliated Union or Fund so long as said Unions or said Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. "Participant" as used herein means any employee or former employee of any Employer who makes contributions in behalf of such employee or of any employee benefit plan maintained by the Union, or any member or former member of an employee organization who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees designated, nominated and appointed

in accordance with this Agreement and Declaration of Trust and any successor Trustees designated in the manner provided herein.

Section 5. **AGREEMENT AND DECLARATION OF TRUST.** The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modification hereof and the trust created hereunder.

Section 6. **WELFARE PLAN.** The term "Welfare Plan" as used herein means the Employee Benefit Plan, program, method and procedure for the payment by the Trustee of benefits from the Trust Fund, in accordance with such rules and regulations relating to eligibility requirements, including period of membership in the Union, amount and computation of benefits and the general administration and operation of the Fund as the Trustees may from time to time adopt and promulgate.

Section 7. **CONTRIBUTIONS.** The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether under and pursuant to said collective bargaining or other written agreements for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. **WELFARE FUND.** The term "Welfare Fund" shall mean the "New York City Nursing Home—Local 144 Welfare Fund".

Section 9. **TRUST FUND.** The term "Trust Fund" shall mean the contributions paid by the Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of, the Welfare Fund.

Section 10. **BENEFICIARY.** The term "Beneficiary" means any person designated by a participant or by the

terms of the Welfare Plan who is or may be entitled to a benefit thereunder.

Setcion 11. INVESTMENT MANAGER. "Investment Manager" means any fiduciary other than a Trustee or named fiduciary who has the power to manage, acquire or dispose of any asset of the Plan, is a registered investment adviser or a bank as defined in the Investment Advisers Act of 1940 or an insurance company qualified to exercise said powers under the laws of more than one state of the United States and has acknowledged in writing that he is afiduciary with respect to the Plan.

## ARTICLE II

### *NAME*

This Trust Fund shall be known as the New York City Nursing Home—Local 144 Welfare Fund, and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

## ARTICLE III

### *PURPOSE OF THE TRUST*

Section 1. The Trust and the Fund are created for the exclusive purpose of providing and maintaining hospitalizaiton, sick, disability and accident benefits, medical and surgical benefits, life insurance or death or other benefits as may be determined by the Trustees, for the benefit of the employees of the Employers, and if so determined by the Trustees, in whole or in part, group insurance for hospitalization, sick, disability and accident benefits, surgical and medical care or life insurance and death benefits for the families of such employees as defined by the Trustees, and for the purpose of defraying the reasonable expenses of administering the Trust and the Fund.

The Trustees may agree, with regard to any such policy or insurance, with the insurance carrier thereof,

upon waiting periods, definition of full-time employment and such other provisions concerning eligibility of employees as the Trustees may deem appropriate. Nothing herein shall be construed to restrict the Trustees, in securing benefits to the employees, to the purchase of insurance.

#### ARTICLE IV

##### *APPROVAL OF GOVERNMENTAL AGENCIES*

Section 1. The Welfare Plan established under this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, and qualifies for tax deductibility of the contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust the Welfare Plan and such other information as it may be required to submit to the Internal Revenue Service for a ruling as to the qualifications of the Welfare Plan under the Internal Revenue Code, or to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comp with the provisions of the Employee Retirement Income Security Act of 1974. In making such submissions, the Trustees shall provide such data and make such representations on their behalf and on behalf of contribtuing Employers as may be required. In making such submissions, the Trustees shall engage the services of an actuary which has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Employee Retirement Income Security Act of 1974.

#### ARTICLE V

##### *CONTRIBUTIONS TO THE TRUST-FUND*

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining

agreements made by the Union, the Association and Employers on behalf of covered employees, and shall be paid to the Trustees at such regular intervals, in accordance with said collective bargaining agreements, and as the Trustees shall direct.

Section 2. Each Employer and the Union shall promptly furnish to the Trustees on demand such payroll records and data with respect to the individual employees benefiting from this Agreement that the Trustees may require in connection with the administration of the Trust and the policies; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll record of each Employer with respect to individual employees benefiting from this Agreement whenever such examination is deemed the proper administration of the Trust.

Section 3. (a) In addition to all other remedies, if the Trustees, or any of them, shall complain that any Employer has not made full payment to the Trustees as required under the provisions of any of the collective bargaining agreements, such complaint shall be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees likewise are hereby given the right, in their own names as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy for the purpose of effectuating the collection of any sums due to them from any Employer under the provisions of the applicable collective bargaining agreement (sic). The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages, interest at such rate as the Trustees shall from time (sic) to time determine, and the costs and legal fees incurred by it in such proceeding, as are or may be due to the Fund.



## ARTICLE VI

*POWERS, DUTIES, EXPENSES AND FEES  
OF THE TRUSTEES*

Section 1. The Trustees may, among other things:

(a) Accept and receive all contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more investment managers as hereinafter provided.

(b) Formulate, adopt and administer a Welfare Plan for the exclusive benefit of the covered employees in order to provide health and welfare benefits for the covered employees. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein.

(c) Promulgate and establish rules and regulations for the administration and operation of the Welfare Plan in order to effectuate the purposes thereof.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion deem necessary or advisable for the sound and efficient administration of the Welfare Plan.

(e) Receive any securities or other property of any kind, nature or description, whatsoever that are tendered to them and that they deem to be acceptable.

(f) Enter into agreements, contracts and other instruments for the deposits of funds with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation, which accept and hold monies on deposit, and to authorize such depository to act as custodian of the funds, whether in cash or securities or other property.



(g) The Trustees are empowered to enter into Agreements, contracts and other instruments for the deposit or investment of funds with banks and trust companies and to delegate to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property. To provide for the administration of the Trust Fund, the Trustees in their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims) (1) may appoint as investment manager an organization or entity which has the power to manage, acquire, or to dispose of any asset of a Plan as defined in the Employee Retirement Income Security Act of 1974 and which is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) a bank as defined in that Act or (iii) an insurance company qualified to perform these services under the law of more than one state of the United States, (2) may transfer to the investment manager all, or such part as they deem desirable, of the assets of the Fund, and (3) may enter into an agreement with the investment manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Employee Retirement Income Security Act of 1974, including but not limited to, provisions relating to delegating to the investment manager, authority to manage, acquire or dispose of the assets of the Fund transferred (sic) to it the acknowledgement by the investment manager it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the investment manager on behalf of all persons having an interest in the Fund. Any such

appointment or agreement shall be subject to terminate by the Trustees upon thirty (30) days notice.

(h) Authorize withdrawals of monies from such account or accounts, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(i) Invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

(j) Exercise all rights or privileges granted to the policy holder by provision of each policy or allowed by the insurance carrier of such policy and may agree with such insurance carrier to any alteration, modification or amendment of such policy and may take any action respecting such policy or the insurance provided thereunder, which may be necessary or advisable, and such insurance carrier shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with such policy. If the Trustees so agree with any insurance carrier or carriers of the policy or policies, the Trustees, or any one or more of them, or any person or persons designated by them, may pass upon the validity of claims for benefits under a policy or policies and, in payment of such claims in the amounts approved, may sign drafts upon the insurance carrier or carriers of such policy or policies.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer, or dispose of any securities or other property at any time held by them for cash or on credit; and convert, or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the

limitation herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances, of any corporation, company or Association, any of the securities of which may at any time be held hereunder, exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy or otherwise upon securities held by the Trustees and to exercise by attorney or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held by them hereunder.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or otherwise necessary to accomplish the purposes of the Trust Fund and this Trust Agreement.

(h) Borrow money from any and all types of persons, companies or institutions upon such terms and conditions

as the Trustees may deem desirable and for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in their possession as Trustees.

(i) Authorize by resolution any one or more of the Trustees to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereupon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Do all other Acts, and take any and all other action, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Welfare Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees. The Trustees may appoint a Fund manager to perform administrative and such other duties as the Trustees may from time to time lawfully delegate. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an investment manager or managers.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Association and the other Employers.

Section 5. Notices given to the Trustees, the Union, the Association, or the Employers, shall, unless otherwise specified, be sufficient if in writing and delivered to, or sent by postpaid first class mail or prepaid telegram. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Association, Union or Employers shall be sufficient if delivered in person or if sent by postpaid first class mail.

Section 6. The expenses incurred in the collection of contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. Insofar as practicable the Trustees shall utilize all facilities offered to them by the Union to collect Employer contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interests of the Fund, the participants and beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or the collective bargaining agreements under which this Trust Agreement is maintained.

Section 8. The Trustees shall have the power to merge with any other fund established for similar purposes as this Trust Fund under terms and conditions mutually agreeable to the respective Trustees.

Section 9. Any Trustee or fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant. Any fiduciary with respect to the Trust or Plan may receive reimbursement of expenses properly and actually incurred in the performance of his duties with the Plan. Such reasonable expenses shall include the costs incurred in attendance at and participation in appropriate educational conferences held for fiduciaries and administrators of jointly man-



aged multi-employer benefit plans. However, no fiduciary shall receive compensation from the Plan other than for reimbursement of expenses actually and properly incurred.

## ARTICLE VII

### *ACCOUNTS, RECORDS AND AUDITING THEREOF*

Section 1. All income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant as required by law not less frequently than once each year, and shall engage the services of an enrolled actuary for the purpose of preparing all actuarial information and actuarial valuations as required by law. A copy of this audit along with a Plan description, the bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including participants and beneficiaries. These reports shall be available in the principal office of the Fund and such other location, including those which may be prescribed by law, as is necessary to make available all pertinent information to all participants.

The Trustees shall furnish to each participant (sic) covered under the Plan and to each beneficiary receiving benefits under the Plan a copy of the current Summary Plan description and Annual Report as required by law. Upon written request of a participant or beneficiary receiving Plan benefits and at a reasonable charge, the Trustees shall furnish any participant or beneficiary receiving benefits a copy of the updated Summary Plan description, Plan description, Annual Report, Trust



Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request records from contributing Employers with respect to wages and employment and shall have the right to examine said wage and employment records through duly authorized representatives including certified public accountants.

Section 4. The Trustees shall furnish to an Employer after completion of an audit, pursuant to Article VII, Section 3 hereof, a written audit report. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount within thirty (30) days from the date of the conference with interest at the rate of six (6) per cent per annum from the date when payment was due.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Trustees. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Trustee unless a delinquency is established in an amount in excess of \$500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit with interest on the delinquency at the rate of six (6) per cent per annum from the date payment was due.

## ARTICLE VIII

### *CLAIMS AND INDIVIDUAL RIGHTS*

Section 1. No Employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part

thereof, except that employees shall have the right to such benefits as may specifically be provided by the Pension Plan and the applicable rules and regulations thereunder.

Section 2. No employee shall have the option to receive any part of the Employer's contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or his withdrawal through severance of employment or otherwise, except as permitted by the Employee Retirement Income Security Act of 1974.

Section 3. No monies, property or equity of any nature whatsoever in the Trust or Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any employee or person claiming through such employee, to anticipation, alienation sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charity and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer. No claim for a refund or a contribution or other payment to the Fund shall be allowed except as permitted by law and then only upon the basis of such evidence as the Trustees may require.

## ARTICLE IX

### *OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS*

Section 1. Each Trustee or other Plan Fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters

would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Plan in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interest are adverse to the interest of the Plan or its participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan-inconnection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable in Trustee duties have been specifically assigned to a Co-Trustee for committing a breach of fiduciary responsibilities. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, the named fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, providing that the named fiduciary exercised the required degree of prudence, skill and care in making such allocation or design-

nation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in the Plan's trust instrument to manage or control the assets of a plan other than the power to appoint an investment manager.

Section 5. The Trustees shall not be liable either individually or as Trustees for any acts or omissions of a prudently appointed investment manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the investment manager's fiduciary responsibility with respect to the Plan), and shall be under no obligation to invest or otherwise manage any assets of the Fund that is subject to the management of the investment manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to this Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity of expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereof (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in

accordance with the terms and conditions contained in the Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that such Trustee or Trustees breached the fiduciary obligations set forth in the Employee Retirement Income Security Act of 1974.

## ARTICLE X

### *APPOINTMENT, REMOVAL, VOTING, RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES*

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated as Union-appointed Trustees, and the other four (4) as Association-appointed Trustees by the Association acting on behalf of all contributing Employers. The above-named Trustees, each for himself, accept their appointment as Trustees and consent to act as Trustee hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Trust Agreement and for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in the Union-designated Trustees shall be filled by appointment of the Executive Board of the Union and any vacancy in Association-designated Trustees shall be filled by appointment of the Association. No vacancy or vacancies in the office of Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of this Trust.

Section 3. The Union and the Association may remove any of their respective appointees at any time provided



the party making such removal simultaneously appoints a successor in his place.

Section 4. Three (3) Union-appointed Trustees and three (3) Association-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees and a majority of the Association-appointed Trustees present representing their group.

Section 5. A Trustee may resign by giving a notice in writing to the remaining Trustees.

Section 6. The President and Secretary-Treasurer of the Union and the President of the Association shall by virtue of their offices be members of the Board of Trustees. The other Union-appointed Trustees shall be designated by the Executive Board of the Union. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees shall serve until removed or until their successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union and the President of the Association shall serve as long as they continue to hold their respective offices in either the Union or the Association.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union or any successor to any of them, a successor Trustee shall be designated by the Union or any successor to any of them, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Association, his successor Trustee shall be designated in writing by the Presi-



dent of the Association which shall be filed with the remaining Trustees.

Section 9. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by the required number of Trustees of the question to be decided.

Section 10. In the event the Trustees are unable to agree on action within seven days, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and in the event of failure of the Trustees to agree upon an impartial arbitrator within seven days, any one of the Trustees may petition the American Arbitration Association for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding.

Section 11. One of such Trustees shall be appointed by vote of the Trustees as Chairman of the Trust Fund and one of such Trustees shall be appointed as Secretary of the Trust Fund, but at all times one of those officers shall be a Union-appointed Trustee and the other shall be an Association-appointed Trustee.

Section 12. The Chairman or the Secretary or any three (3) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

## ARTICLE XI

### *TERMINATION OF THE TRUST*

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall (sic) be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments

due or to become due under this Agreement or the Welfare Plan promulgated hereunder to persons already drawing benefits;

(b) In the event there are no individuals living who can qualify as participants or beneficiaries hereunder;

(c) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants and beneficiaries of the Plan in the manner set forth in the Plan in full accordance with the law, after making provisions for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made.

### ARTICLE XIII

#### *BONDING AND INSURANCE*

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. Any individual designated by a Trustee to attend meetings of the Trustees and to act in his behalf in his absence shall also be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 per cent of the amount of funds handled by the person, or class or persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bond may not be procured from any surety or other company agent or broker in whose business operations such Plan or any party in interest has any direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent per-

mitted by law, to cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against the Trustee or fiduciary as may be required by law. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

## ARTICLE XIV

### *EXECUTION AND INTERPRETATION*

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the contributions provided for herein, a practical plan for benefits for employees, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan, for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder shall be deemed exclusively to define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the ultimate plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the singular form they shall be construed as they were also used in the plural form in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the plural form they shall be construed as though they were also used in the singular form in all situations where they would so apply.

## ARTICLE XV

### AMENDMENTS

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Association appointed Trustees and by the Union-appointed Trustees, provided that no amendment shall divert any of the Trust

Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will ~~continue~~ its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall divert any of the Trust from the purposes of this Fund, nor shall there be any amendment as a result of which there shall not be an equal number of Employer Trustees and Union Trustees. No amendment shall reduce retroactively the benefits of any participant or beneficiary as of the time the amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a participant or beneficiary as of the first plan year to which the amendment applies.

## ARTICLE XVI

### *EFFECTIVE DATE*

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 15th day of December 1975.

/s/ Moses Brownstein (L.S.) /s/ Peter Otley (L.S.)

/s/ Meyer Temkin (L.S.) /s/ John Kelley (L.S.)

/s/ Lee Lichtman (L.S.) /s/ Clarence Morgan (L.S.)



**Exhibit A****Attachment V—Amended Pension Fund Trust Agreement  
of Local 144—Nursing Home Pension Fund,  
dated December 15, 1975**

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***LOCAL 144—NUSING (sic) HOME PENSION FUND*****AGREEMENT AND DECLARATION OF TRUST**

AGREEMENT dated the 15th day of December, 1975, by, between and among John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Lichtman, constituting all of the Trustees of the Local 144—Nursing Home Pension Fund (hereinafter referred to as the "Trustees"),

**WITNESSETH**

WHEREAS, by Agreement and Declaration of Trust dated as of December 12, 1963, Local 144, Hotel and Allied Service Employees Union, AFL-CIO, (hereinafter referred to as the "Union"), the Metropolitan New York Nursing Home Association, Inc. (hereinafter referred to as the "Association"), and Peter Ottley, John Kelley, Peter Byrne, Eugene Hollander, Irving Weissman and Sander Kolitch, the then Trustees, established a trust for the purpose of providing pension benefits for employees of the Association represented by the Union which was thereafter amended from time to time; and

WHEREAS, the said Agreement and Declaration of Trust, as amended, provides that the same may be amended by an instrument in writing executed by the Association-appointed Trustees and the Union-appointed Trustees; and

WHEREAS, John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Licht-



man now constitute the Trustees of the said Local 144—Nursing Home Pension Fund; and

WHEREAS, the Trustees desire to further amend said Agreement and Declaration of Trust as hereinafter set forth,

NOW, THEREFORE, the Agreement and Declaration of Trust is hereby amended and restated to provide as follows:

## ARTICLE I

### DEFINITIONS

Section 1. EMPLOYER. The term "Employer" shall mean each Employer who (a) is a member of the Association whose employees are covered by any collective bargaining agreement existing between the Union and the Association, and (b) is not a member of the Association but with whom the Union enters into a collective bargaining agreement. The term "Employer" shall also mean for the purpose of this Agreement, the Union and any affiliated Union or Fund so long as said Unions or said Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. "Participant" as used herein means any employee or former employee of any Employer who makes contributions in behalf of such employee or of any employee benefit plan maintained by the Union, or any member or former member of an employee organization who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees designated, nominated and appointed

in accordance with this Agreement and Declaration of Trust and any successor Trustees designated in the manner provided herein.

Section 5. **AGREEMENT AND DECLARATION OF TRUST.** The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modification hereof and the trust created hereunder.

Section 6. **PENSION PLAN.** The term "Pension Plan" as used herein means the Employee Benefit Plan, program, method and procedure for the payment by the Trustees of benefits from the Trust Fund, in accordance with such rules and regulations relating to eligibility requirements, including retirement age, amount and computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate.

Section 7. **CONTRIBUTIONS.** The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether under and pursuant to collective bargaining agreements or other written agreements for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. **PENSION FUND.** The term "Pension Fund" shall mean the "Local 144—Nursing Home Pension Fund."

Section 9. **TRUST FUND.** The term "Trust Fund" shall mean the contributions paid by the Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, any life insurance or annuity contract or contracts held in or forming a part of, the Pension Fund.

Section 10. **BENEFICIARY.** The term "Beneficiary" means any person designated by a participant or by the

terms of the Pension Plan who is or may be entitled to a benefit thereunder.

Section 11. INVESTMENT MANAGER. "Investment Manager" means any fiduciary other than a Trustee or named fiduciary who has the power to manage, acquire or dispose of any asset of the Plan, is a registered investment adviser or a bank as defined in the Investment Advisers Act of 1940 or an insurance company qualified to exercise said powers under the laws of more than one state of the United States, and has acknowledged in writing that he is a fiduciary with respect to the Plan.

## ARTICLE II

### *NAME*

This Trust Fund shall be known as the Local 144—Nursing Home Pension Fund, and the Trustees shall conduct the business of the Trust and execute all agreement in that name.

## ARTICLE III

### *PURPOSES*

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Pension Plan to be formulated, pension and retirement benefits for the employees as herein defined and defraying the reasonable expenses of administering the Trust and the Fund.

## ARTICLE IV

### *APPROVAL OF GOVERNMENTAL AGENCIES*

Section 1. The Pension Plan established under this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, and qualifies for tax deductibility of the contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Pension Plan and such other information as it may be required to submit to the Internal Revenue Service for a ruling as to the qualifications of the Pension Plan under the Internal Revenue Code, or to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Employee Retirement Income Security Act of 1974. In making such submissions, the Trustees shall provide such data and make such representations on their behalf and on behalf of contributing employers as may be required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Employee Retirement Income Security Act of 1974.

## ARTICLE V

### *CONTRIBUTIONS TO THE TRUST FUND*

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Association and the Employers on behalf of covered employees, and shall be paid to the Trustees at such regular intervals, in accordance with said collective bargaining agreements, and as the Trustees shall direct.

Section 2. (a) In addition to all other remedies, if the Trustees, or any of them, shall complain that any Employer has not made full payment to the Trustees as required under the provisions of any of the collective bargaining agreements, such complaint shall be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees likewise are hereby given the right, in their own names as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy for the purpose of effectuating the collection of any sums due to them from any Employer under the provisions of the applicable collective bargaining agreement. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages, interest at such rate as the Trustees shall from time to time determine and the costs and legal fees incurred by it in such proceeding, as are or may be due to the Fund.

## ARTICLE VI

### *POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES*

Section 1. The Trustees may, among other things:

(a) Accept and receive all contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more investment managers as hereinafter provided.

(b) Formulate, adopt and administer a Pension Plan for the exclusive benefit of the covered employees in order to provide pensions and retirement benefits for the covered employees. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein.

(c) Promulgate and establish rules and regulations for the administration and operation of the Pension Plan in order to effectuate the purposes thereof; and in pursuance thereto (but without limitation of the powers of the Trustees by reason of such enumeration), formulate and establish the conditions of eligibility with re-



spect to age and length of service, past and future service benefit credits, the method of providing pensions, the investment of funds and any and all other matters which the Trustees, in their discretion, may deem necessary or proper to effectuate the purposes and intent of the Pension Plan.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion deem necessary or advisable for the sound and efficient administration of the Pension Plan.

(e) Receive any securities or other property of any kind, nature or description whatsoever that are tendered to them and that they deem to be acceptable.

(f) Enter into agreements, contracts and other instruments for the deposits of funds with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation, which accept and hold monies on deposits, and to authorize such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) The Trustees are empowered to enter into Agreements, contracts and other instruments for the deposit or investment of funds with banks and trust companies and to delegate to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property. To provide for the administration of the Trust Fund, the Trustees in their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims) (1) may appoint as investment manager an organization or entity which has the power to manage, acquire, or to dispose of any asset of



a Plan as defined in the Employee Retirement Income Security Act of 1974 and which is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) a bank as defined in that Act or (iii) an insurance company qualified to perform these services under the laws of more than one state of the United States, (2) may transfer to the investment manager all, or such part as they deem desirable, of the assets of the Fund, and (3) may enter into an agreement with the investment manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Employee Retirement Income Security Act of 1974, including, but not limited to, provisions relating to delegating to the investment manager, authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the investment manager it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the investment manager on behalf of all persons having an interest in the Fund.

Any such appointment or Agreement shall be subject to termination by the Trustees upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the investment manager may authorize the investment manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the investment manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401 (a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect), the instrument creating such trust fund, together with any amendments, modifications or supplements thereof, being hereby effective

when and as such investments are made incorporated in and made a part of this Agreement and Declaration of Trust as fully and to all intents and purposes as if set forth herein at length.

(h) Authorize withdrawals of monies from such account or accounts, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(i) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer, or dispose of any securities or other property at any time held by them for cash or on credit; and convert, or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the limitation herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances, of any corporation, company or Association, any of the securities of which may at any time be held hereunder, exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Comprise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy or otherwise upon securities held by the Trustees and to exercise by attorney or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held by them hereunder.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or otherwise necessary to accomplish the purposes of the Trust Fund and this Trust Agreement.

(h) Borrow money from any and all types of persons, companies or institutions upon such terms and conditions as the Trustees may deem desirable and for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in their possession as Trustees.

(i) Authorize by resolution any one or more of the Trustees to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereupon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Pension Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees. The Trustees may appoint a Fund manager to perform administrative and such other duties as the Trustees may from time to time lawfully delegate. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an investment manager or managers.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Association, and the other Employers.

Section 5. Notices given to the Trustees, the Union, the Association, or the Employers, shall, unless otherwise specified, be sufficient if in writing and delivered to, or sent by postpaid first class mail or prepaid telegram. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Association, Union or Employers shall be sufficient if delivered in person or if sent by postpaid first class mail.

Section 6. The expenses incurred in the collection of contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. Insofar as practicable the Trustees shall utilize all facilities offered to them by the Union to collect employer contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interests of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or the collective bargaining agreements under which this Trust Agreement is maintained.

Section 8. The Trustees shall have the power to merge with any other fund established for similar purposes as this Trust Fund under terms and conditions mutually agreeable to the respective Trustees.

Section 9. Any Trustee or fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant. Any fiduciary with respect to the Trust or Plan may receive reimbursement of expenses properly and actually incurred in the performance of his duties with the Plan. Such reasonable expenses shall include the costs incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Plan other than for reimbursement of expenses actually and properly incurred.

## ARTICLE VII

### *ACCOUNTS, RECORDS AND AUDITING THEREOF*

Section 1. All income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.



Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant not less frequently than once each year, and shall engage the services of an enrolled actuary for the purposes of preparing all actuarial information and actuarial valuations as required by law. A copy of this audit along with a Plan description, the bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including participants and beneficiaries. These reports shall be available in the principal office of the Administrator and such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all participants.

The Trustees shall furnish to each participant covered under the Plan and to each beneficiary receiving benefits under the Plan a copy of the current Summary Plan description and Annual Report as required by law. Upon written request of a participant or beneficiary receiving Plan benefits and at a reasonable charge, the Trustees shall furnish any participant or beneficiary receiving benefits a copy of the updated Summary Plan description, Plan description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request records from ~~contributing~~ Employers with respect to wages and employment and shall have the right to examine said wage and employment records through duly authorized representatives including certified public accountants.

Section 4. The Trustees shall furnish to an Employer after completion of an audit, pursuant to Article VII,



Section 3 hereof, a written audit report. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount within thirty (30) days from the date of the conference with interest at the rate of six (6) per cent per annum from the date when payment was due.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Trustees. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Trustees unless a delinquency is established in an amount in excess of \$500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit with interest on the delinquency at the rate of six (6) per cent per annum from the date payment was due.

## ARTICLE VIII

### *CLAIMS AND INDIVIDUAL RIGHTS*

Section 1. No Employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided by the Plan.

Section 2. No employee shall have the option to receive any part of the Employer's contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or his withdrawal through severance of employment or otherwise, except as permitted by the Employee Retirement Income Security Act of 1974.

Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any employee or person claiming through such employee, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer. No claim for a refund of a contribution or other payment to the Fund shall be allowed except as permitted by the Employee Retirement Income Security Act of 1974, and then only upon the basis of such evidence as the Trustees may require.

## ARTICLE IX

### *OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS*

Section 1. Each Trustee or other Plan Fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Plan in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee for committing a breach of fiduciary responsibilities. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, the named fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, providing that the named fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in the Plan's trust instrument to manage or control the assets of a plan other than the power to appoint an investment manager.

Section 5. The Trustee shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed investment manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the investment manager's fiduciary responsibility with respect to the Plan), and shall be under

no obligation to invest or otherwise manage any assets of the Fund that is subject to the management of the investment manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to this Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that such Trustees or Trustee breached the fiduciary obligations set forth in the Employee Retirement Income Security Act of 1974.

## ARTICLE X

*APPOINTMENT, REMOVAL, VOTING,  
RESIGNATION AND  
ADMINISTRATIVE FUNCTIONS OF TRUSTEES*

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated as Union-appointed Trustees, and the other four (4) as Association-appointed Trustees by the Association acting on behalf of all contributing Employers. The Trustees, each for himself, accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Trust Agreement and for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union and any vacancy in Association-designated Trustees shall be filled by appointment of the Association. No vacancy or vacancies in the office of Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of this Trust.

Section 3. The Union and the Association may remove any of their respective appointees at any time provided the party making such removal simultaneously appoints a successor in his place.

Section 4. Three (3) Union-appointed Trustees and three (3) Association-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees and a majority of the Association-appointed Trustees present representing their group.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees.



Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees. The other Union-appointed Trustees shall be designated by the Executive Board of the Union. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees shall serve until removed or until their successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union and the President of the Association shall serve as long as they continue to hold their respective offices in either the Union or the Association.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union or any successor to any of them, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Association, his successor Trustees shall be designated in writing by the President of the Association which shall be filed with the remaining Trustees. •

Section 9. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by the required number of Trustees of the question to be decided.

Section 10. In the event the Trustees are unable to agree on action within seven days, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and in the event of failure of the Trustees to agree upon an impartial arbitrator within seven days, any one of the Trustees may petition the American Arbitration Association for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding.



Section 11. One of such Trustees shall be appointed by vote of the Trustees as Chairman of the Trust Fund and one of such Trustees shall be appointed as Secretary of the Trust Fund, but at all times one of those officers shall be a Union-appointed Trustee and the other shall be an Association-appointed Trustee.

Section 12. The Chairman or the Secretary or any three (3) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

## ARTICLE XI

### *TERMINATION OF THE TRUST*

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to become due under this Agreement or the Pension Plan promulgated hereunder to persons already drawing benefits;

(b) In the event there are no individuals living who can qualify as participants or beneficiaries hereunder;

(c) In the event that the Pension Benefit Guaranty Corporation institutes a proceeding to terminate the Plan under the provisions of the Employee Retirement Income Security Act of 1974;

(d) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants and beneficiaries of the Plan in

the manner set forth in the Plan in full accordance with the law, after making provisions for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made.

## ARTICLE XII

### *BONDING AND INSURANCE*

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. Any individual designated by a Trustee to attend meetings of the Trustees and to act in his behalf in his absence shall also be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 per cent of the amount of funds handled by the person, or class of persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bond may not be procured from any surety or other company agent or broker in whose business operations such Plan or any party in interest has any direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by law, to cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against the Trustee or fiduciary as may be required by law. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Trustees shall at all times pay such premiums as may be required by the Pension Benefit Guaranty Corporation.

Section 4. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

### ARTICLE XIII

#### *EXECUTION AND INTERPRETATION*

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the contributions provided for herein, a practical plan for benefits for employees upon their retirement, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan, for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder shall be deemed exclusively to define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such

illegality shall make impossible or impractical the functioning of the ultimate plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

## ARTICLE XV

### *AMENDMENTS*

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Association-appointed Trustees and by the Union-appointed Trustees, provided that no amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall divert any of the Trust from the purposes of this Fund, nor shall there be any amendment as a result of which there shall not be an equal number of Employer Trustees and Union Trustees. No amendment shall reduce retroactively the vested benefits of any participant, pensioner or beneficiary as of the time the amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a participant, pensioner or beneficiary as of the first plan year to which the amendment applies.

ARTICLE XVI  
*EFFECTIVE DATE*

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hand and seals this 15th day of December, 1975.

/s/ Moses Brownstein (L.S.) /s/ Peter Otley (L.S.)

/s/ Meyer Temkin (L.S.) /s/ John Kelley (L.S.)

/s/ Lee Lichtman (L.S.) /s/ Clarence Morgan (L.S.)

**Exhibit A**

**Attachment VI—Selected Pages from the Local 144  
Nursing Home Welfare Fund Group Insurance Plan booklet**

**INSURANCE PLAN**

**GROUP INSURANCE PLAN**

**[EMBLEM]**

**LOCAL 144  
NURSING HOME  
WELFARE FUND**



\* \* \* \*

3. Your employer ceases to be a Contributing Employer,

4. The Group Insurance Policy is terminated.

Prescription Drug Coverage will terminate should one of the above occur as of the date shown on the prescription drug card.

If your employment ceases because of disability for which you receive weekly accident and sickness benefits or Workmen's Compensation benefits, coverage will be continued while you receive such benefits up to a maximum of 26 weeks from the day your employment stopped.

Your Accident and Sickness Insurance will terminate:

1. Upon termination of employment.
2. If the Group Insurance Policy is cancelled.
3. The date your employer ceases to be a Contributing Employer.

However, there are State Laws, which provide possible protection and coverage within the first four weeks following termination of benefits. Again, should such a disability arise, contact the Fund Office for advice as to your rights of coverage.

## REINSTATEMENT OF INSURANCE

All of your benefits except Accident and Sickness Benefits will be reinstated on the date you return to full-time work for a Contributing Employer within six months after the date the insurance was terminated or if you return to work within 30 days after recovery from a disability for which you receive weekly accident and sickness benefits or Workmen's Compensation Benefits, or within 30 days of the termination of your insurance after 26 weeks of such disability.

If you do not return to work within the time specified above, you will be considered a new employee for group insurance purposes and it will be necessary for you to again fulfill the eligibility requirements also shown on page 5.

**Exhibit A**

**Attachment VII—Local 144 Nursing Home Pension Plan,  
dated January 1, 1986**

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**LOCAL 144 NURSING HOME  
PENSION PLAN**

**As Amended Through  
January 1, 1986**

*LOCAL 144 NURSING HOME  
Pension Plan*

*ARTICLE 1*

*Definitions*

*Section 1.01 Agreement*

"Agreement" means a written collective bargaining agreement between the Union and any employer, (including the Association), which requires contributions to the Fund in a manner acceptable to the Fund.

*Section 1.02 Association*

"Association" means the Greater New York Health Care Facilities Association, Inc.

*Section 1.03 Beneficiary*

"Beneficiary" means the person designated by a Participant or Pensioner to receive any monies due that Participant or Pensioner at the date of his death or becoming due by virtue of his death as specified in Sections 3.10 or 7.02.

*Section 1.04 Contribution Date*

"Contribution Date" with respect to each Participant means the first date as of which an Employer was or shall become obligated to make contributions to the Fund for the Participant, provided however that the Contribution Date with respect to a Participant who has incurred a Permanent Break in Service means the date as of which his subsequent Employer first became obligated to make contributions to the Fund.

*Section 1.05 Covered Employment*

"Covered Employment" means employment with an Employer as an Employee after the Contribution Date. For

periods prior to the Contribution Date "Covered Employment" shall include work performed in all nursing homes in New York City and environs including but not limited to work performed in jobs covered by an Agreement with the Union.

*Section 1.06 Effective Date*

"Effective Date" of the Plan shall mean September 1, 1976 except as otherwise specified in the Plan or as otherwise required by ERISA.

*Section 1.07 Employee*

"Employee" means a person who on or after the Effective Date is an employee of an Employer and who is covered by an Agreement between the Union and the Association or the Union and any other Employer and any employees of the Union, the Association or the Fund for whom contributions are required to be made to the Fund on the same basis as for any other Employer.

*Section 1.08 Employer*

"Employer" means pursuant to acceptance by the Trustees:

- (a) An employer who is a member of the Association and whose Employees are covered by an Agreement in full force and effect;
  - (b) An employer who is not a member of the Association, but whose Employees are covered by an Agreement in full force and effect; and
  - (c) The Union, the Association or the Fund so long as such Union, Association or Fund make the required contributions to the Fund as any other Employer;
- provided, however, that any such Employer shall not include any person, organization or business which is a member of a controlled group of corporations or under common control unless such other person, organization or

business has executed an Agreement and been accepted by the Trustees as an Employer.

*Section 1.09 ERISA*

"ERISA" means the Employee Retirement Income Security Act of 1974.

*Section 1.10 Hour of Service*

"Hour of Service" means each hour for which an Employee is paid or entitled to payment by an Employer for services performed on both a straight-time and over-time basis and any hour for which back pay is awarded or agreed to irrespective of litigation or damages.

*Section 1.11 Normal Retirement Age*

"Normal Retirement Age" means age sixty-five (65) or the age of the Participant on the tenth anniversary of Participation, whichever is later, excluding Participation before a Permanent Break in Service.

*Section 1.12 Participant*

"Participant" means an Employee who meets the requirements for participation in the Plan as set forth in Article 2.

*Section 1.13 Pensioner*

"Pensioner" means a person to whom a pension under this Plan is being paid or to whom such a pension would be paid except for time for administrative processing.

*Section 1.14 Pension Credits*

"Pension Credits" means the years of credit or portions thereof for purposes of benefit accrual for work in Covered Employment which are accumulated and maintained for Participants in accordance with the provisions of Article 4 of the Plan.

*Section 1.15 Pension Plan*

"Pension Plan" or "Plan" means the plan set forth in this document.



*Section 1.16 Pension Fund*

"Pension Fund" or "Fund" means the Local 144 Nursing Home Pension Fund established under the Trust Agreement.

*Section 1.17 Plan Year*

"Plan Year" means the period from January 1 to the next December 31.

*Section 1.18 Retirement*

- (a) "Retirement" means cessation of employment or engaging in any of the following:
  - (i) Employment with a Contributing Employer; or
  - (ii) Employment with any Employer in the same or related business as any Contributing Employer; or
  - (iii) Self-Employment in the same or related business as any Contributing Employer in a geographic area covered by the Plan; or
  - (iv) Employment, or self-employment in any business which is or may be under the jurisdiction of the Union.
- (b) *Exceptions.* A Participant who has ceased Covered Employment shall be considered Retired after attainment of his Normal Retirement Age, notwithstanding subsequent employment or re-employment with an Employer, or of the type described in this Section, if such employment or re-employment is for less than forty (40) hours in any month.

*Section 1.19 Trust Agreement*

"Trust Agreement" means the Agreement and Declaration of Trust establishing the Local 144 Nursing Home Pension Fund dated effective as of December 12, 1963 and as thereafter amended.

*Section 1.20 Trustees*

"Trustees" means the Board of Trustees as established and constituted from time to time in accordance with the Trust Agreement.

*Section 1.21 Union*

"Union" means Local 144 Hotel, Hospital, Nursing Home and Allied Services Union of the Service Employee International Union, AFL-CIO.

*Section 1.22 Year of Participation*

"Year of Participation" means a Plan Year in which a Participant has completed 870 Hours of Service.

*Section 1.23 Gender*

Except as the context may specifically require otherwise, use of the masculine gender shall be understood to include both masculine and feminine genders.

*Section 1.24 Other Terms*

Other terms are specifically defined as follows:

Term	Section
(a) ERISA	2.01
(b) Regular Pension	3.02
(c) Reduced Pension	3.03
(d) Early Retirement Pension	3.04
(e) Deferred Pension	3.05
(f) Disability Pension	3.06
(g) Pension Credits	4.01 and 4.02
(h) Years of Vesting Service	4.05
(i) Breaks in Service	4.06
(j) Partial Pensions	5.01
(k) Joint and Survivor Pension	6.01
(l) Effective Date	6.06
(m) Commencement Date	8.05
(n) Retired or Retirement	8.06 and 1.18
(o) Vested Status	8.08

*ARTICLE 3**Pension Requirements and Benefit Amounts**Section 3.01 General*

This article outlines the types of pensions provided under the Plan and the requirements which must be met in order for a Participant to be entitled to receive them.

*Section 3.02 Regular Pension*

(a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Regular Pension, if at the time of his Retirement he meets the following requirements:

- (i) he has attained age sixty-five (65); and
- (ii) he has at least twenty-five (25) Pension Credits.

(b) *Amount.* The monthly amount of the Regular Pension is \$350 for a Participant whose Retirement is on or after October 1, 1984.

*Section 3.03 Reduced Pension*

(a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Reduced Pension, if at the time of his Retirement he meets the following requirements:

- (i) he has attained age sixty-five (65); and
- (ii) he has at least fifteen (15) but less than twenty-five (25) Pension Credits.

(b) *Amount.* The monthly amount of the Reduced Pension shall be that proportion of the Regular Pension which the number of Pension Credits which the Participant has accumulated bears to twenty-five (25). The resulting figure shall be rounded to the nearest multiple of fifty cents (\$.50).

*Section 3.04 Early Retirement Pension*

- (a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Early Retirement Pension, if at the time of his Retirement he meets the following requirements:
  - (i) he has attained age fifty-five (55) ; and
  - (ii) he has at least fifteen (15) Pension Credits.
- (b) *Amount.* The monthly amount of the Early Retirement Pension is as follows:
  - (i) There shall be first determined the amount of Regular or Reduced Pension to which the Participant would be entitled if he were then sixty-five (65) years of age;
  - (ii) The amount so determined shall then be reduced by one half of one percent ( $\frac{1}{2}\%$ ) for each month by which the Participant is younger than age sixty-five (65) on the Commencement Date of his Early Retirement Pension; and
  - (iii) The monthly amount so determined shall be rounded to the nearest multiple of fifty cents (\$.50).

**Exhibit B**  
**Affidavit of Peter Ottley**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**AFFIDAVIT OF PETER OUTLEY**

COUNTY OF NEW YORK    )  
                                  ) ss:  
STATE OF NEW YORK     )

Peter Ottley, being duly sworn, deposes and says:

1. I am the President of Local 144 Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO (Local 144). I am also Chairman of the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund (collectively referred to as "Greater New York Funds"). I make this affidavit in response to certain statements in the affidavit of Jonathan L. Sulds which purportedly describes 1984 negotiations between Local 144 and certain employers to whom he was counsel, and to verify the authenticity of certain Collective Bargaining Agreements.

2. Mr. Sulds refers to discussions which he characterizes as having formed the basis for his clients' agreement to enter into the 1984 collective bargaining agreement with Local 144. Mr. Sulds says, absolutely inaccurately, that Local 144 had concurred in the notion that upon the establishment of new pension and welfare funds

by his clients (to be known as the Southern Funds) that reserves of the Greater New York Funds to which his clients were then contributors would be somehow divided and a portion transferred to the Southern Funds. There was never any such understanding. From time to time, as Mr. Sulds discussed the establishment of Southern Funds, Local 144 counsel cautioned Mr. Sulds and his clients that they were undertaking a substantial responsibility; that because of the relatively small number of employees who would be covered by the proposed new funds there would be a potential for substantial additional cost to the employers to maintain the same benefits for employees as had been provided to them under the terms of Greater New York Funds.

3. I either participated in or received reports of discussions with Mr. Sulds and Local 144's counsel in which our attorney questioned the wisdom of the creation of separate funds and suggested that Mr. Sulds' clients direct their efforts to gaining participation in the management of the Greater New York Funds rather than going off on their own.

4. Mr. Sulds refers to the case of Local 50 which he claims to have shown to me and to our counsel during negotiations. My attorney reminds me that Mr. Sulds did show a copy of the decision to her at a meeting at the New York University Club where certain of our negotiations took place. Not only did my counsel say to him that there was nothing in the case which would require any division of reserves if the new funds were created, but there was also a reminder that no funds should be created on such a speculative basis.

5. During negotiations we repeatedly questioned the good sense of Southern employers in undertaking the responsibility for establishing new funds. Because of the kinds of pensions the Southern group anticipated creating, the Southern employers gave assurances that nothing more than a short start-up period would be necessary to



accrue sufficient money to permit the new funds to operate.

6. Mr. Sulds' statement in paragraph 9 of his affidavit that I agreed to the concept that reduction in benefits could be avoided by division of the reserves is untrue. The only position I took with regard to benefits—and it is unvarying—was that the employers would be obliged to guarantee the same benefits as those provided by the Greater New York Funds. I understood my attorney to be expressing the same caution that I did that any shortfall would be the responsibility of the employers to make up. It was for that reason that we talked about potential fiduciary obligation and financial burden to the employers.

7. Mr. Sulds' statement that the Union's recognition that the Greater New York Funds were overfunded, and its anticipation that reserves would be divided, formed the basis for reaching a collective bargaining agreement is also categorically untrue.

8. Mr. Sulds is rewriting history when he attributes to me or to my counsel or to anyone on behalf of Local 144 any agreement with respect to reserves. Quite the contrary, the Union was determined to achieve only one result; that all of the employees covered by the Greater New York Funds would lose no benefits if the Southern employers ceased contributing to the Greater New York Funds and began contributing to the Southern Funds. There were repeated warnings that there could be personal liability on the part of the Southern Funds trustees if they failed to meet that obligation without regard to any potential for any monies obtained from the Greater New York Funds.

9. The Union negotiated for and obtained direct commitments in the collective bargaining agreements signed by each Southern employer that there would be a continuity of benefits for employees to be covered by the Southern Funds, and that no employee would lose benefits

because benefits would come from the Southern Funds rather than from the Greater Funds. In other words, the Union demanded and secured from each of the Southern employers a guarantee that if the Southern employers' actions in withdrawing from Greater Funds and establishing the Southern Funds could have any adverse effect on employees, the contracting Southern employers would be responsible for remedying that adverse effect. It was on the basis of these guarantees that the Union agreed to formation of the Southern Funds.

10. The section of the November 30, 1984 collective bargaining agreements entitled "Litigation" expressly did not commit the Union to take any affirmative action to promote the Southern employees' proposed lawsuit; indeed, the Union stated in that section only that it would not oppose the *bringing* of such an action by the employers "to the extent it is consistent with applicable law."

11. Mr. Sulds misstates the Union's basis for consent to the "Litigation" provision. As stated above, the Union's concerns were met by inserting provisions in the collective bargaining agreements binding the Southern employers to make good any harm caused by the new arrangement. The Union did not rely on the possibility that assets would be taken from the Greater New York Funds and placed in the Southern Funds. Instead, the Union legally bound the Southern employers to underwrite the payment of full benefits to the affected employees.

12. In 1981, the Southern employers did not negotiate with the Union as part of the Greater New York Health Care Facilities Association, Inc. The Southern employers negotiated and signed individual contracts with the Union in 1981, but the text of all the individual contracts was virtually identical insofar as they committed each of the plaintiff employees to make contributions to the Greater New York Funds. A true and correct copy of one of the individual contracts is attached as Attachment I.

13. A true and correct copy of the cover page, page 1, pages 21-28 and page 31 of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. dated April 1, 1981 is attached as Attachment II. This agreement covered the period April 1, 1981 through March 31, 1984.

/s/ Peter Ottley  
PETER OTTLEY

(Noterization Omitted in Printing)

**Exhibit B****Attachment I—Agreement between Local 144 and Fort Tryon  
Nursing Home and F.T.N.H. Management, Inc.  
dated April 3, 1981**

AGREEMENT made and entered into this 3rd day of April, 1981 by and between Local 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO ("Union") and FORT TRYON NURSING HOME AND F.T.N.H. MANAGEMENT, INC. ("Employer")

"Employer"

**WITNESSETH:**

WHEREAS, the parties acknowledge that they were fully bound by all of the terms and conditions of the Collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association Inc. (consisting of the agreements covering the various bargaining units of employees represented by the Union), which collective bargaining agreement expired by its term on March 31, 1981; and

WHEREAS, the parties desire to extend and renew their contractual relationship;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

1. The parties extend and renew their contractual relationship for the three (3) year period commencing April 1, 1981 and continuing up to and including March 31, 1984 and agree that during such period they will be bound by all of the terms and conditions of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. (consisting of the agreement covering the various bargain-

ing units of employees represented by the Union) covering the period April 1, 1981 through March 31, 1984, except as modified in Paragraph "2" hereof.

2. Modifications:

- a. All references to membership in or representation by the Greater New York Health Care Facilities Association, Inc. shall not be part of this agreement.
- b. The parties hereto shall designate an Impartial Chairman to be agreed upon by their attorneys (Jonathan Sulds for the Employer and Irwin Bluestein for the Union) within ten (10) days. Failing to agree, they shall request the American Arbitration Association to make such designation.
- c. In the event that the Union and the Southern New York Residential Health Care Facilities Association, Inc. shall establish a joint welfare fund providing for benefits no less than those provided by the welfare fund established by the Union and the Greater New York Health Care Facilities Association, Inc., the Employer shall be permitted to contribute to such fund and the Employer's employees will be covered by such fund.

3. Except as modified above, the terms and conditions of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. (consisting of the agreements covering the various bargaining units of employees represented by the Union) shall be binding on the parties for the three (3) year period commencing April 1, 1981 and continuing up through March 31, 1984.

IN WITNESS WHEREOF, the parties have executed this agreement as of the day and year first above written.

LOCAL 144, HOTEL, HOSPITAL,  
NURSING HOME & ALLIED  
SERVICE EMPLOYEES UNION,  
SEIU, AFL-CIO

By: /s/ Peter Ottley  
PETER OTTLEY  
President

Employer  
FORT TRYON NURSING HOME  
By: /s/ Jack Friedman  
JACK FRIEDMAN

Employer  
F.T.N.H. MANAGEMENT, INC.  
By: /s/ Nat Sherman  
NAT SHERMAN



**Exhibit B**

**Attachment II—Selected pages from Collective Bargaining  
Agreement between Local 144 and Greater New York  
Health Care Facilities Association, Inc.  
dated April 1, 1981**

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**AGREEMENT**

between

[EMBLEM]

**LOCAL 144 HOTEL, HOSPITAL,  
NURSING HOME & ALLIED SERVICE  
EMPLOYEES UNION, SEIU, AFL-CIO**

**and**

***Greater New York Health Care  
Facilities Association, Inc.***

AGREEMENT made as of the 1st day of April, 1981, by and between LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICES UNION, SEIU, AFL-CIO (hereinafter referred to as the "Union") on behalf of itself and its members in the bargaining unit (hereinafter referred to as the "employees") now employed or hereafter to be employed by residential health care facility members of the GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION, INC. (formerly known as the Metropolitan New York Nursing Home Association, Inc.) (hereinafter referred to as the "Association") and the Association on behalf of itself and those of its present members and those hereafter becoming members, who have authorized or shall authorize the making of this agreement (such members hereinafter being referred to as the "Employers").

#### WITNESSETH:

WHEREAS, the Association is a membership corporation consisting of Employers engaged in the ownership and/or operation of residential health care facilities; and

WHEREAS, the Union has been designated by the majority of the employees of the Employers in the bargaining unit as their sole collective bargaining agent with respect of wages, hours and other conditions of employment; and

WHEREAS, it is recognized that the efficient and orderly method of establishing and maintaining peaceful and harmonious labor relations and of dealing with the problems and controversies arising out of employment is through negotiations and agreement, rather than through strikes and lockouts; and

WHEREAS, the contracting parties are desirous of maintaining and promoting the highest standards of service and labor unity;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

\* \* \* \*

4. There shall be a special file cabinet on each floor for the use of the ward clerks.

5. To the extent practicable, there shall be an orderly or lifter for each floor.

6. The parties shall submit to a committee consisting of three (3) members designated by the Union and three (3) members designated by the Association the task of developing job descriptions for all classifications of employees covered by the agreement. The committee shall report back to the parties within one hundred and twenty (120) days.

## 20. WELFARE FUND

A. The Association and the Union shall continue to maintain a Welfare Fund, known as the New York City Nursing Home-Local 144 Welfare Fund for their employees and each Employer shall make contributions thereto for each employee covered by this agreement of eight and one-half (8½%) percent of the gross payroll of all bargaining unit employees. Effective October 1, 1983, such rate of contribution shall be increased to nine and one-half (9½%) percent of the said gross payroll. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contribution shall be paid by each Employer on or before the tenth day of each month and shall cover the previous months' employees covered by this agreement. In the event the Employer, without justification, fails to promptly remit such monies, the Impartial Chairman may upon application assess interest at the legal rate against the Employer.

C. The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Welfare Fund solely for those fringe benefits set forth in the Trust Agreement heretofore executed and thereafter amended establishing such New York City Nursing-Local 144 Welfare Fund.

D. The Employer shall furnish to the Union quarterly a statement indicating the names of the employees covered by this agreement, their social security numbers and the amount of wages paid, or such other report, record or statement as shall supply such information, and agree to make available for inspection to the Trustees of the Fund all payroll records that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the New York City Nursing Home-Local 144 Welfare Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund, copies of which are on file with the Association and the Union, and the Employers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

F. Disability payments payable to the State will be included in the contributions paid by the Employer provided said amount will be sufficient to pay for the benefits now provided by the Fund in addition to such disability payments.

## 21. DENTAL FUND

A. The Association and the Union agree to establish a fund known as the New York City Nursing Home-Local 144 Dental Fund, for the purposes of providing dental

treatment to their employees. Each Employer shall make contributions thereto for each employee covered by this agreement of one (1%) percent of the gross payroll of all bargaining unit employees. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contributions shall be paid by each Employer on or before the tenth day of each month and shall cover the previous months' employees covered by this agreement. In the event the Employer, without justification, fails to promptly remit such monies, the Impartial Chairman may, upon application assess interest at the legal rate against the Employer.

C. The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Dental Fund solely for those fringe benefits set forth in the Trust Agreement to be adopted and executed establishing such New York City Nursing Home-Local 144 Dental Fund.

D. The Employer shall furnish to the Union quarterly a statement indicating the names and classifications of employees covered by this agreement, their social security numbers and the amount of wages paid or such other report, record or statement as shall supply such information, and agree to make available for inspection to the Trustees of the Fund all payroll records that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the New York City Nursing Home-Local 144 Dental Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust to be executed in connection with the said Fund, copies of which will be placed on file with the Association and the Union, and the Employ-

ers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

## 22. PENSION FUND

A. The Association and the Union shall continue to maintain a Pension Fund, known as the Local 144-Nursing Home Pension Fund for their employees and each Employer shall make contributions thereto for each of his employees covered by this agreement of five (5%) percent of the gross payroll of bargaining unit employees. Effective October 1, 1983, such rate of contribution shall be increased to six (6%) percent of the said gross payroll. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contributions shall be paid by each Employer on or before the tenth day of each month and shall cover the previous month's employees covered by this agreement. In the event the Employer, without justification fails to promptly remit such monies, the Impartial Chairman can, upon application, assess interest at the legal rate against the Employer.

C. The payments so made by the Employers shall be used by the Local 144-Nursing Home Pension Fund solely for those benefits set forth in the Trust Agreement executed hereunder and thereafter amended establishing such Local 144-Nursing Home Pension Fund.

D. The Employer shall furnish to the Union a statement indicating the names of the employees covered by this agreement, their social security numbers and the amount of wages paid, or such other report, record or statement as shall supply such information, and agree



to make available for inspection to the Trustees of the Fund all payroll records of bargaining unit employees that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the Local 144-Nursing Home Pension Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund, as the same from time to time might be amended, copies of which are on file with the Association and the Union, and the Employers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

F. The parties shall increase the Pension Benefit at the following rates and the following dates:

January 1, 1979:	Pension Benefit \$225 per month
December 15, 1979:	Pension Benefit \$275 per month
September 1, 1981:	Pension Benefit \$300 per month

## 23. SKILL AND PRODUCTIVITY IMPROVEMENT FUND

The Employers shall contribute one (1%) percent of "gross payroll," as that term is defined in the Welfare, Dental and Pension Fund provisions of this agreement, to a Skill and Productivity Improvement Fund (sometimes termed the "Education Fund").

## 24. CONTRIBUTIONS

A. "Gross payroll" for the purpose of contributions to the various Funds herein shall be frozen at the rates of pay in effect on September 30, 1980, through January 31, 1982.

If any employee, subsequent to the probationary period, one (1) week in a reporting month, the Employer must make contributions to the Funds on his behalf based on his entire gross pay for the reporting month, but need not in such cases pay disability benefit premiums for such employee during such month.

B. The Employer will not be required to make contributions to the Funds on behalf of casual employees who work less than the ERISA casual vesting hours as specified in the Trust indenture of Local 144-Nursing Home Pension Fund in a calendar year. In the event the total gross payroll for employees exceeds twenty (20%) percent of the total gross annual payroll of the facility, the Employer shall be required to make contributions on that amount exceeding twenty (20%) percent of the gross bargaining unit payroll. The casuals shall be subject to Union security provisions of the contract, and shall receive other contract benefits applicable to casuals. To ensure against abuses in the administration or implementation of the foregoing, John D. Feerick, Esq. shall review this matter upon request of either or both side.

#### C. Excursions from Bargaining Unit

For the purposes of defining "gross payroll," the following job classifications shall be excluded:

- a. Administrator and assistant, if any.
- b. Director of Nursing Services.
- c. Consultant Dietician.
- d. Controller or Headbookkeeper, where there is no Controller; Controller and Headbookkeeper; Headbookkeeper and Assistant Bookkeeper, if any.
- e. One confidential secretary (who spends the greater part of of her time working with administration).
- f. Physical and Occupational Therapy Workers.

- g. Executive Housekeeper (performs no floor work).
- h. In-service Training Nurse (performs no floor work).
- i. Consortium Trainees (until they are placed on staff).
- j. Guard.
- k. Social Workers (except as otherwise provided in Schedule "B").

D. In the event a dispute arises in connection with the failure of an Employer to make the required contributions to the various Local 144 Nursing Home Funds in the full amounts required, and in the event that the Union submits the matter to arbitration and prevails, the Arbitrator's decision shall contain a directive requiring the Employer to pay all reasonable audit and accountants' fees, the full amount of the Arbitrator's fees, collection expenses including court costs, if any, and interest at the then current legal rate, together with reasonable attorneys' fees for the attorney representing the Union and/or the Funds in connection with the arbitration and/or court proceedings.

Notwithstanding the foregoing, if any employee is disentitled to any benefits provided by the Funds by reason of an Employer's delinquency in the payment of contributions, such Employer shall be liable to such employee, in a civil action, for the full amount of the benefits which the employee lost, together with court costs. Acceptance or collection of delinquent contributions by the Fund shall not absolve the Employer of this liability.

E. In the event that an Employer is two or more months delinquent in making contributions to the various Local 144 Nursing Home Funds, then the Union may take such matter to arbitration and the Impartial Chairman, in addition to granting such other relief as he may deem appropriate in the premises, shall be empowered to direct

such Employer thereafter to enter into an irrevocable "check off" arrangement with the State of New York or such banking institution to enter into such a "check off" arrangement. Such "check off" arrangement must provide for the direct payment to the Funds by the State of New York or such banking institution of contributions due or becoming due from such Employer to the funds.

The Association shall prepare documents and establish procedures to be followed in connection with the above "check off" provision and Employers shall use such documents and follow such procedures wherever practicable.

Nothing contained in the above "check off" provisions or elsewhere herein shall preclude the Union from taking any other steps which it may deem appropriate in the case of a failure to make Fund contributions as required or make inapplicable any remedy available to the Union, contractually or otherwise.

## 25. SEVERANCE

Employees with one or more years of substantially continuous employment who are permanently laid-off shall receive severance pay at the rate of one (1) week of pay for each completed year of substantially continuous employment with an Employer up to a maximum of four (4) weeks of pay, which maximum shall be increased to six (6) weeks of pay effective April 1, 1982. For the purpose of this provision, a week's pay shall be defined as the regular weekly pay of the employee so affected which was in effect at the time of such permanent layoff.

## 26. CONTRACTING OUT

Any contract or agreement between the Employer and an outside contractor who employs employees of the Employer in job classifications covered by this agreement shall comply with all the terms and conditions of this agreement, including but not limited to the seniority and

layoff provisions, and the Employer guarantees the performance thereof by the contractor.

## 27. CHECK-OFF AUTHORIZATION

Upon written authorization, each Employer shall deduct from the first wages paid employees in each month all dues, assessments and initiation fees which the Union shall notify the Employer to be due to the Union from the employee. The monies so deducted shall be held by the Employers in trust and they shall remit them to the Union promptly, together with a list of employees paying said dues, including categories and wages paid. In the event the Employer without justification fails to promptly remit such monies, the Impartial Chairman may upon application assess interest at the legal rate against the Employer.

1. In determining the amount, if any, that an Employer's liability for contributions to the various Local 144 Nursing Home Funds was increased by reason of the Feerick Award, interest thereon shall commence and be calculated at the rate of twelve (12%) percent per annum from the date of the Award.

2. The Association shall, simultaneously with the execution hereof, turn over to the Local 144 Nursing Home Funds, for appropriate credit to the accounts of its affected Employer members, the moneys it has heretofore received on account of the Feerick Award from the State of New York, together with the actual interest earned on such money from the time of its receipt by the Association, but in no event shall such interest be at a lesser rate than twelve (12%) per annum.

B. Any Employer member of the Association which claims entitlement to 30% forgiveness of its 1976 Local 144 Nursing Home Welfare Fund liability on the ground that it has complied with the conditions imposed upon those claiming such entitlement by Eric Schmertz, Esq.

shall submit such issue for binding determination to Eric Schmertz, Esq. within twenty (20) days from the date hereof, or it shall forever be deemed to have waived such claim.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed by their proper officers as of the day and year first above written.

LOCAL 144 HOTEL, HOSPITAL, NURSING  
HOME & ALLIED SERVICE EMPLOYEES  
UNION, SEIU, AFL-CIO

By /s/ Peter Ottley, President  
GREATER NEW YORK HEALTH CARE  
FACILITIES ASSOCIATION, INC.

By /s/ [Illegible]



**Exhibit C****Affidavit of A.H. Higgs, Jr.**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**AFFIDAVIT OF A. H. HIGGS, JR.**

COUNTY OF NEW YORK    )  
                                  ) ss:  
STATE OF NEW YORK     )

A. H. Higgs, Jr., being duly sworn, deposes and says:

1. I am Vice President of the Martin E. Segal Company, Mid-Atlantic Division and ~~have~~ held this position since April 1, 1983. I have been employed at the Martin E. Segal Company for over 13 years and have been an account executive working with Trustees of multiemployer employer benefit funds for more than 11 years. In the course of my employment, I have had responsibility for more than 50 pension, health benefits and supplemental benefit funds. While the preponderance of these funds have been multiemployer employee benefit funds, there have also been association funds and single employer funds. The Martin E. Segal Company is retained to provide consultant services to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund and I have been assigned to provide those services since 1975.

In addition to servicing ongoing funds, I have assisted trustees in establishing pension funds both in the United States, and overseas. Presently, I work with two large pension funds in the Commonwealth of the Bahamas. I am also a general Consultant for pension and health matters to the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. In that capacity, I have assisted the International Association in the implementation of an international reciprocal agreement for both pension and health benefit funds of the International Association's Local Unions and District Councils.

2. I hold a B.S. in Engineering from the U.S. Naval Academy. I am a licensed broker for registered and excess lines business by the New York State Insurance Department and sub-licensee for the Martin E. Segal Company.

3. The Martin E. Segal Company ("Segal") has been a leading employee benefits and compensation consulting firm since 1939. Many widely accepted benefits and benefit provisions are innovations first conceived, designed and introduced by the Company. It serves a wide variety of national and international clients including corporations, state and local governments, non-profit organizations, and boards of trustees of employee benefit plans.

4. Segal provides actuarial and consulting services for more than 3,000 separate employee benefit and compensation programs covering more than 8,000,000 employees and their dependents. With regard to multiemployer employee benefit plans, the Martin E. Segal Company is the predominant benefit consulting firm in the nation, in that it serves about half of all the multiemployer plan participants in the country. (There are approximately 9 million employees plus their families in over 2,000 multiemployer pension plans in the country.) Segal experts have been consulted by Congressional committees, state legislatures, the Treasury Department, the Pension Benefit Guaranty Corporation, the Department of Labor, the

Department of Health and Human Services, the Equal Employment Opportunity Commission and other executive and regulatory agencies involved with legislation such as the Employee Retirement Income Security Act ("ERISA"), the Deficit Reduction Act ("DEFRA"), the Retirement Equity Act ("REA"), the Tax Equity and Fiscal Responsibility Act ("TEFRA"), and the Age Discrimination in Employment Act ("ADEA").

5. The concept of a group of individuals pooling their resources to provide against a common risk is a well established insurance principle. The strength of the group resides in the statistical probability of the insured risk not affecting each participant in the group. The larger the group, the greater the uniformity in the spread of the risk, meaning that the laws of probability normalized from year to year and the statistical occurrence of events are more predictable.

6. These principles are applicable whether the group concept is employed in the short-term to health benefits or in the long-term to defined benefit pension plans. Inherent in a group plan providing benefits is the fact that during a finite period of time, a significant number of the participants will not make a claim. However, those participants that do make claims form the experience of the group. The experience of the group plus expenses incurred less any return on assets determines the actual cost of benefits for any group. It is that resulting cost which, in a multiemployer benefit plan, must be paid by employer contributions to the plan.

7. The difference between a group health plan and a defined benefit pension plan is the funding period due to the anticipated benefit payment. Accordingly, a group health benefit plan's costs are adjusted each year based on an actual usage. A defined benefit pension plan's cost will change from year to year, but only on the basis of changes in planned utilization, anticipated expenses or

as a result of a different realized rate of return or anticipated rate of return on assets. Since the experience of a group is the key to determining the cost for a group, advance anticipation of the cost is of primary concern no matter what program of benefits is being contemplated. As such, the group's general characteristics: group size, age and sex distribution; marital mix; income; employment and industry association, are some of the factors that characterize a group and must be considered when anticipating a group's future cost.

8. Multiemployer benefit plans have generally produced large groups of individuals with certain communalities recognized by both underwriters of group health insurance and pension actuaries. For example, a local union plan covering specific job categories is often relatively uniform with regard to employment and income, but widely diverse with regard to age distribution because an entire working career can be, and often is, spent within a range of job classifications. Accordingly, a 55 year old employee will often be working next to a 25 year old employee in the same job classification and generally earning the same hourly wage. In addition, within an industry group one employer may have a generally older work force than another employer without regard to their relative or specific status in an industry. Typically, multiemployer funds do not differentiate between the characteristics of the employees of one employer and another in a local area industry and typically the negotiated employer contribution rate is essentially the same.

9. The Local 144 Nursing Home Pension Fund and New York City Nursing Home Local 144 Welfare Fund are considered as one homogeneous group for actuarial and underwriting cost purposes. In practice, employee characteristics are generally comingled for projection purposes. If such a practice were not followed, an employer's cost from year to year could fluctuate significantly and

there could be no industry collective bargaining agreement which anticipates either a level cost in the case of a Pension Fund or level increments in cost in the instance of a Welfare Fund.

10. Multiemployer health benefit funds can be typically described as pay-as-you-go funding arrangements. Each year's cost is a function of the plan-wide claims experience plus administration offset by interest on the Fund's reserves. Employer contributions are almost invariably comingled regardless of the number of employers that may be contributing to the Fund. Accordingly, for a multiemployer plan providing health benefits, the total group characteristics and claims in aggregate will determine the experience and (together with administrative expenses) the overall cost of the plan. The contribution rate for a multiemployer plan is therefore determined on a uniform basis plan-wide and is the funding mechanism to provide the promised benefits for all employees covered by the plan without regard to their employer or his employees' characteristics. The process is similar to an insurance carrier's establishing group rates for designated groups of employers or members of an organization. Accordingly, no specific consideration is given to a particular employer's employee characteristics or to the employer's employee experience under a plan. If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection. As a matter of actual practice of the Greater New York Funds, during the period I have serviced the Funds, neither of them has paid out any money to an employer or on behalf of an



employer, upon the withdrawal of the employer from the Fund.

11. Since the assets are placed in a comingled trust and experience is comingled, multiemployer funds cannot ascertain a specific employer's experience versus cost, especially where there is an insurance company involved. The New York City Nursing Home Local 144 Welfare Fund is, in this regard, a typical Multiemployer Fund. The costs and therefore contribution rates for the New York City Nursing Home Local 144 Fund have been developed using the above-described method, although a significant portion of the plan is underwritten by insurance carriers or provided through a prepaid health plan. With regard to the New York City Nursing Home Local 144 Welfare Fund, one of the main service providers of health benefits is the Health Insurance Plan of New York ("HIP"). HIP does not maintain experience records since it is a form of prepaid health care and rates are approved by the State of New York based on the whole organization's cost of doing business. As such, the value of the benefits provided to the employees of a particular employer cannot be ascertained. If benefits were to be purchased on an employer by employer basis, the total cost of providing benefits would be higher because the smaller groups result in greater fluctuations and therefore higher risks.

12. Most pension plans, especially those that meet the requirement for tax qualification of the Internal Revenue Service, use a system of advance funding. Since multi-employer defined benefit pension plans are required by their Trust or collective bargaining agreement language to be tax qualified by the Internal Revenue Service, they all employ a system of advance funding. Under such a procedure, assets are set aside in a Trust and costs are recognized before the participants retire. Generally, assets are accumulated during an employee's career, or during his participation in the plan, so that there will be



enough of an accumulation at the time of retirement to pay the benefits accrued. Advance funding is a requirement of the Employee Retirement Income Security Act of 1974 and the Local 144 Nursing Home Pension Fund complies with that requirement. Multiemployer defined benefit pension plans, when negotiated, almost invariably give service credit for an employee's former employment in an industry, commonly referred to as past service. Therefore, at the outset, a defined benefit pension plan incurs an initial liability for past service of an employee with an employer or employers in an industry. In many instances, as with the Local 144 Nursing Home Pension Fund, past service was recognized for any employment prior to the commencement of the plan with an industry employer in the Local area, whether the employer has been subsequently organized or not. Accordingly, a multiemployer defined benefit pension plan's funding must take into consideration the liability associated with past service which in most instances only is verified at retirement. Verification at retirement is the method currently employed by the Local 144 Nursing Home Pension Fund because verification of such service is generally dependent on the Social Security Administration's records of employment. As such, service before an employer began making contributions to a multiemployer pension fund cannot be attributed to any specific employer in advance of retirement and becomes part of a group's overall characteristics for cost purposes.

13. In a multiemployer defined benefit pension fund, an advance funding method must be selected keeping several factors in mind: (1) compliance with ERISA; (2) tax deductibility; (3) cash-flow considerations; and (4) accumulation targets. In addition, multiemployer defined benefit pension funds generally choose a method which minimizes fluctuations of cost from year to year because of collective bargaining. The Trustees of the Local 144 Nursing Home Pension Fund have adopted the Entry Age Normal Cost method which produces a level cost for the

plan from year to year if the group's characteristics, the plan of benefits and experience reflect the assumptions employed in the actuarial valuation. The object of the funding method and the use of the whole group's characteristics is to provide stable level costs from year to year regardless of an employee's movement among contributing employers. The result is an aggregate cost which is then divided by the number of plan participants and the per capita cost developed does not reflect the actuarial cost of their individual benefit accrual. The per capita cost is then translated into a plan cost of cents per hour or in the case of the Local 144 Nursing Home Pension Fund, a percentage of gross wages.

14. The per capita cost does not reflect the cost of the benefits accrued each year by an individual employee for a number of reasons. Included in the aggregate calculation is the assumption that some employees will not collect a benefit as a result of death, disability or the fact that they will leave the plan for any variety of reasons. These are called turn-over assumptions. Also included in the aggregate cost is an amortization payment on unfunded liability. This represents liability accepted by the Fund as a result of crediting past service for benefit accrual or the unfunded liability accepted by the Fund from a benefit improvement which applies the higher rate of accrual to all years of service, past and contributory and/or pensioner benefit improvements. Such an application of a benefit improvement means that employees and/or retirees are receiving credit for an incremental benefit relating to years of service when no contributions were made or that contributions were made in contemplation of a lower benefit. Lastly, the per capita cost assumes a uniform cost of benefit accrual for each participant when in fact the actuarial cost is age dependent—less at younger ages substantially more at older ages.

Accordingly, as with a health benefit fund, the contribution rate is a device to fund the aggregate cost of

the benefits for the group as a whole without regard to any specific employer's employees' characteristics. The actuarial calculations for the Local 144 Nursing Home Pension Fund are, in fact, generally developed as described above. More importantly, there are no distinctions between employees of one employer and another. In addition, past service benefit improvements for both active employees and pensioners have been instituted, and liabilities developed, without consideration of the effect such additional liability may have on employees of individual employers, but the group as a whole. Of significant note is the fact that the Local 144 Nursing Home Pension Fund records for individual employees only reflect their pension credits earned under the plan and do not reflect the employer that the employee worked for when earning pension credits.

15. It is also noteworthy that the Multiemployer Pension Plan Amendments Act of 1980 recognized the nature of multiemployer plans, inasmuch that of the four methods of allocating withdrawal liability, three of the methods, the "presumptive", "two-pool" and "single pool", allocate unfunded vested liability on a percentage basis as an employer's contribution bears to all employer's contributions. While there has been no unfunded vested liability since 1980, the Local 144 Nursing Home Pension Fund has adopted the presumptive method of allocating withdrawal liability. Generally, contribution allocation methods are selected over the attributable method in a related industry situation because of the uniformity of contributions as a result of industry bargaining, but more importantly, because of the perceived movement of employees from one employer to another or the ability of employees to move from one employer to another. The Local 144 Nursing Home Pension Fund participants have such portability of skills within their industry and as such their movement might produce under the attributable method a disproportionate amount of withdrawal liability, especially since a "Last employer rule" would have

to have been adopted. A last employer rule assigns all liability of an employee to his last employer. It is very rare for multiemployer pension plans to adopt the attributable method of allocation of withdrawal liability.

/s/ A. H. Higgs, Jr.  
A. H. HIGGS, JR.

(Notarization Omitted in Printing)

**Exhibit D****Affidavit of William L. Boseski**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**AFFIDAVIT OF WILLIAM L. BOSESKI**

STATE OF NEW YORK       )  
                                  ) ss.:  
COUNTY OF NEW YORK    )

WILLIAM L. BOSESKI, being first duly sworn, deposes and says as follows:

1. Since 1977 I have served as the chief Accountant for Local 144—Greater New York Nursing Home Pension Fund (the “Pension Fund”), the New York Nursing Home—Local 144 Welfare Fund (the “Welfare Fund”), and the Local 144 Health Facilities Training and Upgrading Fund (the “Education Fund”) (collectively referred to as the “Greater New York Funds”).

2. As Chief Accountant, I am familiar with contribution rates required of participating employers of the Greater New York Funds. Employers are obligated by collective bargaining agreements to contribute at a specified rate, which is currently a specific percentage of each Fund of the wages earned by employees in work covered by the collective bargaining agreement. My collection activities are always based on these specific obligations. I have never made any adjustment to the amount of contributions demanded on behalf of the Greater New York Funds on account of calculation or prediction of the cost of providing benefits to a particular employer's work

force. To my knowledge, the Greater New York funds have made no study of the value of the benefits provided to the employees of any particular employer.

/s/ William L. Boseski  
WILLIAM L. BOSESKI

(Notarization Omitted in Printing)



**Exhibit E****Affidavit of Gerald E. Cole****UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**AFFIDAVIT OF GERALD E. COLE**

DISTRICT OF COLUMBIA     )  
                                  ) ss:  
                                  )

Gerald E. Cole, being duly sworn, deposes and says:

1. I have been a practicing attorney for 16 years and was employed by the Pension Benefit Guaranty Corporation from February, 1975 until September, 1983. During my tenure, I served in a number of different capacities. In the fall of 1977, I was assigned to the multiemployer task force, which was charged with preparing a report to the Congress on the condition of multiemployer plans and recommendations for legislation. I directed the preparation of the report and the development of the options discussed therein. I was promoted to Assistant Executive Director for Policy and Planning in 1979. While serving in that capacity, I represented the agency in negotiations on the bills that eventually became the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Thereafter, as Assistant Executive Director, I was charged with formulating policy and preparing regulations to implement MPPA.

2. In the course of my official responsibilities at the PBGC, I was intensively involved in the development of legislative policy positions of the PBGC in connection with the bills which became the Multiemployer Pension Amendments Act of 1980 ("MPPAA"). During the consideration of that legislation in the Congress, I had a lead role as liaison between the PBGC and the Congress.

3. One of the situations the PBGC had experienced was that certain employers which had been contributing employers to a multiemployer pension plan were separated from the plan together with a transfer of significant liabilities to individual pension plans for the employers which left the multiemployer pension plan. The employers who separated from the multiemployer plan were in severe financial difficulty with the result that their individual pension plans soon terminated and made claims on the PBGC for payment of guaranteed benefits under the single employer termination insurance program provided in Title IV of ERISA. The fact that the multiemployer pension plan had transferred liabilities to the individual pension plans without transferring a fair share of assets had the effect of increasing the claims on the PBGC when the individual pension plans terminated. It was clear to PBGC's policy planners, therefore, that a multiemployer pension plan should not be allowed to transfer liabilities to another pension plan without some transfer of assets. The agency supported amendments to prevent such a transfer.

4. Another policy consideration for PBGC was avoidance of discrimination by plans among withdrawing employers. The agency believed that plans, which transfer liabilities might not be evenhanded in transferring assets without some legal standard to guide them. In the case of a disfavored employer, a very small amount of assets might be transferred in relation to the liabilities that were shifted and to the pre-transfer funding of the transferor plan. An overly generous asset transfer might be

made in another case, leaving the transferor plan in worse financial condition than before. As a matter of policy, PBGC took the position that ERISA should require a reasonable degree of uniformity.

5. PBGC's policy-makers favored flexible rather than rigid regulation, allowing plan trustees, who are most familiar with the structure and needs of a plan, to formulate specific rules that are consistent with ERISA. Applying this approach to multiemployer plan liability and asset transfers, the agency supported general ERISA standards on matters such as uniformity, with implementation by individual plan rules when a plan makes an asset transfer. There was no desire to impose such requirements on plans that did not transfer liabilities.

6. PBGC's concerns arose only in connection with transfer of pension liabilities. At no time during the agency's consideration of the provisions which were enacted as Section 4234, or in discussion of those provisions with legislators or legislative staff, was it ever suggested that Section 4234 would apply to welfare plans or that a plan would be required to agree to a transfer of liabilities.

/s/ Gerald E. Cole  
GERALD E. COLE

(Notarization Omitted in Printing)

**Exhibit F**

**Affidavit of John Erlenborn**

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**AFFIDAVIT OF JOHN ERLENBORN**

DISTRICT OF COLUMBIA     )  
  ) ss:  
  )

John Erlenborn, being duly sworn, deposes and says:

1. That deponent is an attorney initially admitted to practice in the State of Illinois in the year 1950. That deponent was elected to serve in the House of Representatives of the United States Congress and entered upon that office in January 1965. In 1966, deponent was elected to serve on the Committee On Education and Labor and served continuously thereon until retirement from Congress in January, 1985. While serving on that Committee, deponent was the ranking minority member of the subcommittee which had jurisdiction of the legislation which became known as ERISA and was author of portions of that legislation. Deponent further was minority floor manager during floor debate, served on the Conference Committee which resolved the differences in the House and Senate versions and managed the debate on the adoption of the Conference Report. In 1980, deponent played similar roles in the passage of the Multiemployer Pension

Plan Amendments Act of 1980 ("MPPAA") and, with the help of professional staff, monitored the implementation of both ERISA and MPPAA. As one of the most active participants in shaping and securing the passage of both ERISA and MPPAA, deponent is aware of the intention of Congress in the passage of that legislation and especially Congressional intent in the passage of Sections 4234 and 4235 of ERISA.

2. Section 4234 of ERISA was enacted to deal with the situation where a multiemployer pension plan wants to transfer some of its liabilities to another plan. It was the intention of those of us in Congress who were overseeing passage of the MPPAA that, if a plan transfers liabilities it was responsible for before the transfer, the law requires that the plan also transfer an appropriate proportion of assets.

3. For those multiemployer plans which choose to transfer liabilities to another plan, there was included in Section 4234 a requirement that such transfers be pursuant to rules to be adopted by the plan.

4. Nothing in Section 4234 was intended to *force* a plan to transfer liabilities, or to have any effect absent a voluntary liability transfer. In contrast, Section 4235 does require transfer of vested liabilities, and assets, in one situation: an employer withdraws from a multiemployer plan because his employees vote a certified change of collective bargaining representatives and, as a result, the employees participate in the new union's multiemployer plan. Congress enacted Section 4235 to insure that the provision of benefits would shift in that situation from the multiemployer plan sponsored by the union that employees had rejected to the one sponsored by the union they had voted for.

5. It was Congress' intent to apply Section 4234's rules concerning asset transfers only in connection with an attempt by a multiemployer pension plan to transfer

some of its liability for vested benefits to another plan. There was never any intention to compel one pension plan to transfer its assets to another in the absence of such a liability transfer. Neither did Congress have any intention of applying the provisions of Section 4234, which was enacted in the Multiemployer Pension Plan Amendments Act of 1980, to welfare plans.

/s/ John Erlenborn  
JOHN ERLENBORN

(Notarization Omitted in Printing)



**Exhibit J**

**Affidavit of E. Calvin Golumbic**

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**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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**AFFIDAVIT OF E. CALVIN GOLUMBIC**

DISTRICT OF COLUMBIA, ss:

E. Calvin Golumbic, being duly sworn, deposes and says:

1. I have been an attorney for 22 years and am a partner in the firm of Arent, Fox, Kintner, Plotkin & Kahn. I was counsel of record for the petitioners (i.e., United Mine Workers of America Health and Retirement Funds, *et al.*) in the U.S. Supreme Court in the case of *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). I also served as General Counsel of the United Mine Workers of America Health and Retirement Funds from 1979 to 1982.

2. The United Mine Workers of America Health and Retirement Funds, in accordance with the Funds' governing instruments, does not require that the contributions of a particular employer be used solely for benefits for the employees of that particular employer. Within each Fund, all assets of the Fund are available to pay all benefits in accordance with eligibility provisions of the Funds without reference to their source.

3. The facts before the U.S. Supreme Court in the *Robinson* case were consistent with paragraph 2 above.

/s/ E. Calvin Golumbic  
E. CALVIN GOLUMBIC

(Notarization Omitted in Printing)

## Exhibit K

### Affidavit of Dan M. McGill

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

## AFFIDAVIT OF DAN M. MCGILL

COUNTY OF PHILDELPHIA )  
 )  
 ) ss:  
STATE OF PENNSYLVANIA )

Dan M. McGill, being duly sworn, deposes and says:

1. I am the Chairman and Professor of Insurance in the Insurance Department of the Wharton School of the University of Pennsylvania, and the Chairman and Research Director of the Pension Research Council of the University of Pennsylvania. I am the Executive Director of the S.S. Huebner Foundation for Insurance Education, Chairman of the Governing Board of the Leonard Davis Institute of Health Economics, and have been Chairman for the last ten years of the Board of Pensions of the Presbyterian Church (U.S.A.) and one of its predecessor agencies.

I am the sole author of five (5) books on pensions, co-author of two (2) others and editor of three (3) more. The best known is *Fundamentals of Private Pensions*, first published in 1955 with four subsequent editions through 1984; the sixth edition is currently in progress. Over

100,000 copies of that volume have been purchased, and the book is widely used as the text for college and university pension courses. It is a prescribed text of the Society of Actuaries, and is widely used as a training text by insurance companies and pension consulting firms. I have frequently lectured and appeared on panels sponsored by national and regional organizations in the business, legal, financial and insurance fields, including the Society of Actuaries, the American Pension Conference, the American Bankers Association, the American Law Institute-American Bar Association, the International Foundation of Employee Benefit Plans, and the Practicing Law Institute, as well as in colleges and universities.

I served as a consultant to the Board of Governors of the Federal Reserve System on pension matters from 1962 to 1980. In 1963 and 1964, I was pension consultant to President Kennedy's Advisory Committee on Labor-Management Relations. I was a member of the United States Department of Labor Advisory Council on Employee Welfare Benefit and Pension Plans from 1966 to 1974. In 1967 and 1968, I was a member of the United States Treasury Department's Panel on Integration of Pension Plans. Beginning in 1975, I was the first Chairman of the Advisory Committee of the Pension Benefit Guaranty Corporation. I retained that position to 1978, and served as a member of the Advisory Committee to 1982.

I am an active consultant to governments and private institutions on pension matters. I have advised the City of Philadelphia, the State of New Jersey, and the Commonwealth of Puerto Rico on their retirement systems. Among the private institutions to which I have given pension advice, are E.I. du Pont de Nemours & Co., Coca-Cola Co., Exxon, Westvaco and Consolidated Natural Gas. I have been retained as an expert consultant on numerous instances by parties contemplating or engaged in litigation on pension matters, and in a limited number of cases I have agreed to give expert testimony.

2. Defined benefit pension plans promise a specific level of benefits to employees who meet the eligibility requirements of the plan. Benefits may be expressed in flat dollar amounts of monthly retirement payments per year of service, or in percentages of compensation for periods such as the last three years before retirement. In order to earn entitlement to the benefits, participants generally must earn credit for a number of years of service under the plan. When the participant satisfies this requirement, he becomes vested in his benefit, which means, generally speaking, that it cannot be forfeited. The employee's rights are against the pension plan, not the employer which sponsors it.

3. The employer sponsor of a defined benefit plan undertakes to fund the plan as required. In practice, this means that actuarial estimates are made of the funding required over a substantial period of time to pay benefits as they come due. The Employee Income Retirement Security Act of 1974 ("ERISA") provides that a minimum level of contributions, also actuarially determined, must be made each year.

4. ERISA also provides that those who control assets of the plan, called fiduciaries, must hold those assets solely for the purpose of providing funds with which to pay benefits under the terms of the plan. There are ERISA rules that bar the return of contributions made by an employer to an ongoing defined benefit plan, except for limited circumstances involving a miscalculation or a mistaken assumption.

5. Employees have no right to share in plan assets of employee pension benefit plans, except as provided by the terms of the plan. Thus, employees who are not employed a sufficient number of years under the plan to become vested receive no benefits, except return of their own contributions, if any, with interest.

6. Multiemployer defined benefit plans are a variant of the defined benefit plans already described. The rights

of participants in these plans are very similar to those of participants in single employer defined benefit plans. However, the individual employers who participate in a multiemployer plan have a different relationship to the plan, and different responsibilities under it, than sponsors of single employer plans, as explained below.

7. ERISA defines a multiemployer pension plan as a plan maintained pursuant to a collective bargaining agreement to which more than one employer is required to contribute.<sup>1</sup> Employers who become signatories to the collective bargaining agreement commit themselves to contribute to the plan on a basis specified in the agreement. Typically, the contributions of a particular employer do not reflect the demographic characteristics—attained age, sex, credited service, and family structure—of his own employee group. Rather, the contribution *rate* of each signatory employer is generally the same as that for every other employer, usually a specified *amount per hour* of covered employment or a specified *percentage of compensation* of covered employees. In some industries, *e.g.* coal mining, the contribution commitment is expressed in terms of *units of output*, such as an amount per ton of coal produced. The plan is administered, as required by federal law, by a joint board of trustees, composed of an equal number of union and employer representatives. The joint board determines the benefit structure of the plan, based upon actuarial estimates of future contributions and investment returns. The projected benefit payouts reflect the demographic characteristics of the composite workforce of the signatory employers, while the projected contribution income is based on estimated future employment for the workforces of the signatory employers. This type of plan standardizes pension costs for competing employers, stabilizes actuarial and investment experience, affords the economies of large scale operations, and

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<sup>1</sup> The statutory definition includes arrangements that involve more than one union or collective bargaining agreement.



provides for transferability of pension credits among the participating employers, thus accommodating labor mobility, an essential feature of a technology-driven economy.

8. Employees covered by a multiemployer plan accrue benefits based upon recognized periods of service under the plan, without regard to the employer or employers for whom the service was performed. The rate of benefit accrual is ordinarily the same for all employees of a given class, again unrelated to the employer or employers for whom the service was rendered. Nor is the benefit accrual necessarily dependent on the actual payment of the required contributions by the employing firm. Neither is a participant's benefit entitlement contingent on the continued financial viability or even existence of any particular employer. As long as the multiemployer plan continues, substituting new employers with comparable payrolls and workforce demographics for those who may leave for any reason, the participants' benefits are secure.

9. In return for contributions at the collectively bargained rate, the employer can offer to his employees the plan's benefit package. The contributions of all employers are available to the trustees of the plan to pay benefits for all eligible employees. As employers come and go, retirees will be paid from plan assets even if the employers for whom they worked have all left the plan and therefore no longer contribute to it. Contribution levels and benefit levels are adjusted from time to time so that, in the aggregate, employer contributions supply funds which, supplemented by investment earnings, are considered adequate on an actuarial basis to provide for payment of plan benefits.

10. By paying the set level of contributions, an employer shares the costs of the entire plan with all other participating employers. Because the composition of an employer's work force can affect the cost of providing pension benefits—a work force that is older than the average will lead to higher pension costs, for example—

an employer may contribute more, or less, than the pension costs incurred by his employees. In practice, nobody makes that comparison; one of the efficiencies of multi-employer plans is that they do not attempt to track costs so that they may be assigned to a particular employer. The same principle applies for individual employees. The amount contributed "for" that employee is fixed by a collectively bargained formula. The cost of the employee's welfare and pension benefits could fall anywhere in a wide range, depending on age, health or other variables.

11. Diversion of multiemployer pension plan assets to any use other than for payment of plan benefits (and necessary expenses) would undermine the operation of such plans.<sup>2</sup> The rationale is sometimes advanced that because a former participating employer made contributions on behalf of his employees, some or all of those contributions should follow the employer and his employees when they leave the multiemployer plan. Putting aside the contractual point that contributions were made in return for rights to plan benefits, not for mere pass-through of contributed amounts, any attempt to do so would be inconsistent with the basic concepts of multi-employer plans, and to measure the amount a multi-employer plan must disgorge would require wastefully detailed and complex accounting of income and imputed costs by the employer. Many multiemployer plans include hundreds, even thousands of employers, and often employees obtain credits under the plan while working for a number of different employers. Individual accounting would be so inordinately expensive that, as a practical matter, many multiemployer plans could not exist if they were forced to undertake it. More important, exposure to claims from any employer who could claim an excess of contributions over costs would destroy the principle on which multiemployer plans are built. No longer would

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<sup>2</sup> As indicated earlier, such diversion would also violate ERISA, §§ 403, 404 and 406. 29 U.S.C. §§ 1103, 1104 and 1106.

there be standardization of pension costs for competing employers, or the stability of experience that comes from broad based cost sharing. While plans would still have to bear losses from employers whose cost to the plan exceeded contributions—including the common situation of default in contributions, often by bankrupt employers—there would be no gain from better-than-average cases. In short, multiemployer plans are cost-sharing devices, and to the extent that cost-sharing is nullified by forced transfers, they will lose their viability.

/s/ Dan M. McGill  
DAN M. MCGILL

(Notarization Omitted in Printing)

**Plaintiffs' Response to Defendants' Rule 3(g) Statement**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**PLAINTIFFS' RESPONSE TO DEFENDANTS'  
RULE 3(g) STATEMENT**

Plaintiffs, by their attorneys Gibson, Dunn & Crutcher, hereby respond to defendants' Local Rule 3(g) Statement.

1. Plaintiffs' do not contest defendants' statements numbered 1-9.

2. Defendants' statement #10 is totally incorrect. As set forth in the attached affidavits, plaintiffs' records do not agree with the figures listed in statement #10. Moreover, defendants have not shown how these figures were derived, nor have plaintiffs had the opportunity to assess the accuracy of defendants calculations.

Dated: July 31, 1987  
New York, New York

Respectfully submitted,

By: /s/ Jonathan L. Sulds  
GIBSON, DUNN & CRUTCHER  
Attorneys for Plaintiffs  
200 Park Avenue  
New York, New York 10166  
(212) 351-4000

**Reply Affidavit of Jonathan L. Sulds**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**REPLY AFFIDAVIT**

STATE OF NEW YORK        )  
                                  ) ss.:  
COUNTY OF NEW YORK    )

JONATHAN L. SULDS being duly sworn, deposes and says:

1. I am a member of the firm, Gibson, Dunn & Crutcher, attorneys for plaintiffs herein, and I make this reply affidavit in further support of plaintiffs' motion for summary judgment and in opposition to defedants' various motions now pending before the Court.

2. At the outset, as the Court is undoubtedly aware, Mr. Ottley has filed an affidavit which differs in numerous particulars from one I have previously filed. I stand by the recollections set forth in my initial affidavit. Mr. Ottley's account of the circumstances leading up to the establishment of the Southern Funds together with his peculiar notion of what the obligations of Local 144 are, in connection with this litigation are at variance, in my judgment, with the specific basis upon which Local 144 negotiated agreements with me on behalf of Southern employers and management companies. I also believe that his assertions are squarely contradicted by the lan-

guage of those agreements, a copy of which is attached to my initial affidavit. In a nutshell, the question is, why would a section concerning the bringing of this litigation and the union's not opposing it have been included in the various agreements with Southern employers and management companies, if it left Mr. Ottley free to file the affidavit he now has?

3. This reply affidavit addresses each of defendants' various motions. Initially, to the extent the motion to intervene by the Education Fund is in the judgment of the Court one which sets forth an adequate legal basis for intervention, we have no objection. I turn first to defendants' various contentions in connection with plaintiffs' motion for summary judgment and defendants' motions for summary judgment and to dismiss for lack of jurisdiction or standing. Thereafter, I turn to defendants' unauthorized motion for summary judgment on the counterclaims which is filed notwithstanding the specific understandings reached in pre-trial conference, and with defendants knowing full well that no discovery in connection with those counterclaims has taken place.

#### PLAINTIFFS' *LOCAL 50*, § 1414, AND EXCLUSIVE USE AND BENEFIT CLAIMS

4. In opposition to the claims by plaintiffs, defendants assert a variety of standing objections. In a nutshell, they contend that Southern employers, management companies, Southern employees, and Southern Funds' management trustees have no nexus to the Greater Funds and are not adversely affected by the failure of the Greater Funds to comply with ERISA § 1414's unequivocal mandate that the Greater Funds must each have in place asset transfer rules. Attached as Exhibit A to this affidavit are relevant pages from the depositions of representative plaintiffs in which they each testify to the harm suffered, the nexus to the Greater Funds, and the adverse effect the failure to have adopted asset transfer



rules works. The attached pages come from the depositions of Southern employees Lindsay and Fernicola, together with Southern employers and management trustees Dicker and Demisay and Grossman and Southern management company, BNH Management by Grossman.

5. As a group or individually these depositions plainly set forth that plaintiffs all have standing. Our accompanying reply memorandum of law provides this Court with the authority which so confirms.

#### DEFENDANTS' COUNTERCLAIM SUMMARY JUDGMENT MOTION

6. Although I did not attend the pre-trial conferences at which the briefing schedule was discussed, I am informed by our former associate, David J. Reilly, that the clear understanding of the Court, defendants and plaintiffs was that all the Court would consider in the context of these motions was plaintiffs' summary judgment motion and defendants' contentions on the merits of those motions. It is my understanding from speaking with Mr. Reilly and a review of the various scheduling orders that have been entered herein, that no authorization was given defendants to file the presently pending summary judgment motion with respect to their counterclaims.

7. Indeed, it is uncontested that there has been no discovery with respect to those counterclaims—and deliberately so because of the discussions with this Court. Because the authorization for bringing this motion at this time is lacking, it should be dismissed.

8. The lack of discovery with respect to defendants' counterclaims also establishes that the motion should not now proceed. (See Rule 56(f), Federal Rules of Civil Procedure.) As the accompanying affidavits on behalf of various plaintiffs show, there is considerable controversy regarding the basis for the Greater Funds' counterclaims and the failure of the Greater Funds appropriately to

provide Southern employers and management companies contractually agreed upon credits. Absent a review of Greater Funds' documentation concerning the counterclaims and the deposition of Greater Funds' personnel in order to make comprehensible exactly what position the Greater Funds are now taking and how they have calculated amounts allegedly due, discovery prior to resolution of this motion is essential and appropriate.\*

9. It bears emphasizing that the facts which would be obtained through such discovery are within the exclusive control and possession of defendants and that such discovery will produce evidence essential to justify plaintiffs' opposition to defendants' counterclaim summary judgment. Nowhere in their motion papers do defendants say how they arrived at their claims.

10. Nor could there be any prejudice to defendants from proceeding in this way. Plaintiffs' claims here ultimately involve significantly more monies than do defendants' counterclaims. When fully resolved, even assuming defendants were right that monies were contractually due to the various Greater Funds by some or all Southern employers or management companies, the amount of monies due by the Greater Funds to the Southern Funds, in connection with plaintiffs' *Local 50* claim will be far greater than that due (if any) to the Greater Funds.

WHEREFORE plaintiffs' motion for summary motion should be granted in all respects. Defendants' motions for summary judgment on the merits, to dismiss for

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\* The Greater Funds and Local 144 have taken a contradictory, ever changing approach to the matters which are essential to defendants' counterclaims. Many of the issues involved, including the availability of credits, have been submitted to arbitration pursuant to the terms of the collective bargaining agreements between Local 144 and various Southern employers and management companies. The present status of such grievances is entirely unclear.

lack of jurisdiction and standing and for summary judgment on the counterclaims should be denied with leave to defendants to move in connection with their counterclaims once discovery has been had.

/s/ Jonathan L. Sulds  
JONATHAN L. SULDS

(Notarization Omitted in Printing)

**Transcript of Proceedings before Judge Sprizzo  
on February 26, 1988**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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(Title Omitted in Printing)

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New York, N.Y.  
February 26, 1988

Before:

HON. JOHN E. SPRIZZO,

District Judge

**APPEARANCES:**

GIBSON DUNN & CRUTCHER  
Attorneys for Plaintiff

By: JONATHAN L. SULDS, Esq.

EPSTEIN BECKER & GREEN  
Attorneys for Defendant

By: HENRY ROSE, Esq.

[2] (Discussion off the record.)

THE COURT: Mr. Rose wants to put his portion of the argument on the record from this point.

MR. ROSE: In both the *Local 50* and in the *O'Hare* case, as we have noted already, the facts and the law predate the 1980 amendments to ERISA dealing with multiemployer plans. The significance of that date is underlined by the Second Circuit in the *O'Hare* case. Let me just read a footnote from the *O'Hare* case. "Most problems created by employer withdrawal from multiemployer pension plans have subsequently been resolved by statute in the Multiemployer Pension Plan Amendments Act of 1980, which however did not apply to changes in bargaining representation occurring before April 29, 1980." So that the Second Circuit recognized that their rulings have been, in effect, statutorily superseded.

THE COURT: Not superseded as to periods not covered by the statute.

MR. ROSE: That is correct.

THE COURT: Not relevant as to periods covered by the statute.

MR. ROSE: Yes, that is correct, your Honor.

The next point I want to make in connection with both of these cases is that both of them were motivated by putting a very high value on the protection of the [3] fundamental right of employees to have a free choice of collective bargaining agents.

THE COURT: That is clear as crystal.

MR. ROSE: It certainly is. And in contrast, in this case, in the present case, the issue arises not because of any such change. In fact, the employees had the same union representation as before. The issue arises here because a few employers wanted to withdraw from the Greater New York Funds. And they point out the employees remain with the same union.

In *Vornado*—

THE COURT: So you are saying in this case it was the employers' interest that was vindicated by the change in funds, not the employees.

MR. ROSE: Yes, your Honor.

THE COURT: Rest your mind. Regardless of what he says in his briefs, which I have read very carefully, I do not regard *Local 50* as dispositive for any one of a number of reasons, some of which you have referred to and some of which you will surely refer to shortly. I don't regard the case as dispositive, because I think it is factually distinguishable. I think it is probably correctly decided on its facts. Perhaps there is some language in the opinion which goes beyond what was necessary to decide that case in suggesting that in all [4] circumstances it is a violation of the law for the funds of one employer to be used for the benefit of employees of other employers. I don't think that language is necessarily consistent with the language of the statute itself. The only question is: Does it allow it after the employees have left the fund? I think there is an open question here. But I think *Local 50* was not dealing with the facts such as we have them here and was not dealing with a situation in which there may very well be a conflict with respect to the obligation which arises under ERISA to see to it that the funds are not used for the benefit of anybody other than a plan participant and the conflict which may be posed by an overexpansive reading of Section 302. So I think these facts are unique. The balancing process is different.

To the extent that your argument is designed to persuade me that *Local 50* is not dispositive, I don't think you need to do that, because I do not regard it as dispositive. Whatever I decide here, the Second Circuit will get another crack at it to tell me whether, on the facts of this case, I am right or wrong.

I am aware of the factual distinctions. You point out one or two new factual distinctions which I was not aware of, which I will put on the record.



(1a) There is a particular provision of the [5] collective bargaining agreement which would foreclose the transfer of the assets here.

(2) The relevant facts in *Local 50* and in the other cases referred to by the Second Circuit occurred prior to the enactment of the multiemployer pension plan amendments in 1980, which I think is a significant circumstance.

(3) Probably as important as any, there is now a provision of the statute which governs specifically situations in which the law would require a transfer. Essentially the point he is making here is that, based upon Section 302, the law requires a transfer. I think your argument is that the statute now tells us under what circumstances the law requires a transfer and, to the extent it is a specific statute governing that, general arguments based upon an expansive reading of Section 302 are no longer permissible or necessary. Correct?

MR. ROSE: That is correct.

THE COURT: I think that is what you were going to tell me. We can shortcircuit this.

MR. ROSE: I couldn't have said it better, your Honor. It reminds me of a comment, if I may paraphrase a comment of the Court earlier this morning in connection with another case. The Second Circuit would not have so decided *Local 50* on the present record in this case.

[6] THE COURT: I don't think they would have. That is why I don't regard it as dispositive. But if I am wrong, they can tell me. I think you have the better of the argument. That is why I would like to hear from him.

MR. SULDS: Thank you, Judge.

MR. ROSE: I do have some more material I would like to share with you.

THE COURT: The matter is fully briefed. Is there anything new that is not encompassed by what I have already said?

MR. ROSE: It may be encompassed but not in particularity.

THE COURT: I know, but we can't go on forever. One of the problems I had with your papers is that they just seem to go on and on. There are very precise, narrow issues here. As I understand your argument, (1) *Local 50* is not dispositive for the reasons you have given and I have put on the record; (2) this structural defect argument, based upon the absence of a requirement in your plan providing for transfers, is circular and bootstrapping, because in a situation in which the law imposes the requirement of a transfer rather than the decision of the people transferring the assets themselves, that kind of provision is not necessary, and you cannot argue a structural defect in a plan because it doesn't have a [7] provision which deals with transfers imposed by law as opposed to by the plan itself. I have no difficulty with any of those arguments. I think you have the better of them.

To the extent that *Robinson* said I should now look into the reasonableness of a collective bargaining agreement, I don't have to even reach the standing questions, and I am not so sure I accept all of your arguments on standing, because I think the issue of standing with respect to all three of these people is not all that clear.

I am not going to decide this case on lack of standing. I am going to decide this case on the merits. I think I should read the merits of this case. To decide it on standing will only lead to one more appeal if the Court of Appeals disagrees with that. I am going to reach the merits of the case. I don't find your standing arguments persuasive, because I think an argument could be made that each one of these three people has standing. I don't think the standing rules are quite as limited as you think they are.

In any event, if I were to decide the case on standing and be wrong in that determination, we would be back here having the Court of Appeals telling me to decide

it on the merits. So I would just as soon deal with the [8] merits now.

I think you have some good arguments that *Robinson* said that, if it is reasonable and if it is not clearly in violation of the law, the Court may not interfere. However, if a collective bargaining agreement allows for the transfer of assets under a situation where ERISA does not permit that to happen, then nothing in *Robinson* would foreclose me from finding that provision of the collective bargaining agreement to be invalid. But you say that is not true here because there is not a clear violation.

MR. ROSE: That is correct. Just one thing in connection with your description of *Robinson*. *Robinson* says if it is a collectively bargained provision, it isn't even tested by reasonableness.

THE COURT: I understand that. But if the collective bargaining agreement allowed them to transfer assets under circumstances which the statute did not permit, I don't think I would be barred by *Robinson* from having jurisdiction to examine the deviation of the collective bargaining provision from the statute. The only argument we are having here is that he says Section 302 makes this a violation of the statute based upon *Local 50*—

MR. SULDS: Judge, it is not the only argument, if I may.

THE COURT: The main argument that you have.

[9] MR. SULDS: No, I don't think that is right.

THE COURT: Then you are going to lose.

MR. SULDS: No, I don't think that is right.

THE COURT: Then why don't we hear from you. What arguments do you have other than that? Let's start there.

MR. SULDS: If I may, I am Jon Sulds from Gibson, Dunn & Crutcher.

THE COURT: If you have other arguments, tell me what they are first.

MR. SULDS: The argument that I think becomes a fulcrum for understanding why Mr. Rose is wrong and your initial reaction to the case needs to be rethought revolves about Section 1414 of ERISA. That is an entirely mandatory provision of the statute which obliges these defendant funds to have in place asset transfer rules. It says "shall." It is mandatory. It doesn't get—

THE COURT: Wait, wait. Where they are going to transfer assets.

MR. SULDS: No, no. They have to have them in place. No, sir. Let me read to you now from *Vornado*, the most recent case on the subject. I am reading from 829 F.2d at 418. There were two parts to the *Vornado* case. First, when *Vornado*—

THE COURT: Let me ask another, more basic [10] question. Even if I were to accept your esoteric argument—

MR. SULDS: It is not esoteric here.

THE COURT: Even if I were to accept your esoteric argument that the statute requires them to have transfer rules, their failure to have transfer rules would not get you the relief you want.

MR. SULDS: Well, it might on a second tier. And the fact is—

THE COURT: How? —

MR. SULDS: Because the asset transfer rules would click in, because we have assumed the liabilities. The asset transfer rules would also demonstrate to you that there is nothing whatever inconsistent between the holding in *Local 50*, 302(c), and 1414. There is no inconsistency here.

THE COURT: Suppose they had asset transfer rules, how would that entitle you to have the assets transferred?

MR. SULDS: We have taken the liabilities. Let me just read to you—

THE COURT: That isn't true, from what he says.

MR. SULDS: But it is absolutely true.

THE COURT: What if these people leave you and go to work for some other employer who is covered by their fund?

[11] MR. SULDS: Judge, we have liabilities with respect to them, just like any of the folks that they have currently covered now. If those folks leave them and go some place else, they lose the liabilities. If the folks we have leave us and go some place else—

THE COURT: That is not the kind of loss of liability that the regulations say require a transfer.

MR. SULDS: I think it is exactly.

THE COURT: I have your argument. I don't accept it. Go to your next argument.

MR. SULDS: Judge, you started from the premise that there is no requirement under the law for mandatory asset transfer rules. That is flatly contradicted by *Vornado*.

THE COURT: I will look at the *Vornado* case.

MR. SULDS: Let me refer you to 418, 29 F.2d, "Discovering that the fund had not yet adopted rules governing the transfer of assets, as required by ERISA, 29 U.S.C. 1414(a), *Vornado* brought suit in the District Court to compel the fund to do so. The District Court concluded that the trustees had a duty to comply with this provision of the statute, and the fund responded by adopting rules in April 1984."

THE COURT: What has that to do with this case? Have you brought an action compelling them to adopt rules [12] governing the transfer of assets?

MR. SULDS: Absolutely.

THE COURT: No, you are asking for the transfer of assets, not the adoption of transfer rules.

MR. SULDS: We have asked them all along. We have asked them all along to adopt them. They haven't. That is the third claim that we make.

THE COURT: But I am saying, does that get to the question of standing?

MR. SULDS: Does it?



THE COURT: Your question of standing becomes much more difficult if you are a nonparticipant in the plan or a nonfiduciary of the plan and you are seeking to have them adopt transfer rules.

MR. SULDS: As a minimum, Judge—

THE COURT: Is that claim in your complaint, and if so, where is it?

MR. SULDS: It is the third claim.

THE COURT: You are seeking to have them adopt transfer rules?

MR. SULDS: That's correct.

THE COURT: I think that one I probably will dismiss for lack of standing.

MR. SULDS: Let me ask you a question, if I may, with respect to that.

[13] THE COURT: Because you are not in any way aggrieved by the lack of transfer rules.

MR. SULDS: They say we haven't picked up liabilities because these folks may come back. Therefore, by definition, these folks are participants. They can't have it both ways. Either some of my plaintiffs are participants for purposes of compelling the adoption of asset transfer rules—

THE COURT: That is not correct. They will become participants when they become eligible to participate in the plan again.

MR. SULDS: Judge, you are faced with a very clear violation of law here.

THE COURT: I am not. You think it is clear; I don't think it is so clear. What I am saying is, even if you are correct and the law requires them to adopt transfer rules, and let's assume you have standing to bring that claim, then the only relief that you are entitled to is to have me direct them to transfer the assets.

MR. SULDS: That's correct.

THE COURT: But then I don't think anybody can complain about the lack of transfer rules, unless they can demonstrate that they would be a party aggrieved by



the lack of transfer rules. Then you would have to demonstrate to me that whatever transfer rules they adopted would [14] require them to transfer these assets to you. So, in the absence of any requirement of the transfer of the assets to your fund, nobody would be aggrieved by the failure to adopt transfer rules.

MR. SULDS: Judge, if I could just have a couple of minutes, because I believe that—

THE COURT: Then we will deal with the disqualification motions later.

MR. SULDS: I don't think that there is one that is here.

THE COURT: They have raised it in their papers.

MR. SULDS: They have raised it in their papers but they haven't made it. If you think there is any issue with respect to that, then I should not be making this argument.

THE COURT: Maybe not. You put in an affidavit based upon personal knowledge. If I grant a summary judgment, then there is no problem.

MR. SULDS: And if you don't grant summary judgment, I have no intention of representing my plaintiffs.

THE COURT: Then for the moment I don't have to deal with that. Go ahead.

MR. SULDS: Among other things, if I may just address that, I put in an affidavit on personal knowledge in April and the question of disqualification wasn't raised [15] until the tail end of all of this, without a chance to respond.

THE COURT: I don't know that that is a waiver. But they haven't made a formal motion yet.

MR. SULDS: So I don't know what I have to address.

THE COURT: I don't have any problem with your arguing the case so long as we don't reach a situation where there is going to be a trial at which your testimony becomes necessary.

MR. SULDS: Judge, the minute it appears to you in the course of this case that I may have to testify regard-

ing what happened in a collective bargaining session, I am out of the case. That is absolutely plain.

THE COURT: If your argument is that you have a claim based upon their failure to adopt transfer rules, tell me how their failure to adopt those transfer rules has aggrieved either the trustees or any employee or the employer or the three plaintiffs here.

MR. SULDS: Let me start with the plaintiff employees with respect to that. Let me, if I may, just kind of sketch out for you what is involved in terms of what was picked up on the Southern side and what—

THE COURT: I know that; I read the papers. Answer my question.

[16] MR. SULDS: I think that is part of an answer to the question.

THE COURT: Go ahead and answer it.

MR. SULDS: With respect to the employees in the welfare situation, welfare funds right now, as you may well be aware, are running a negative cash flow situation. The Southern Fund experienced that and has had recently to change significantly what the nature of the benefits was.

So far as I understand the financing of the Southern Fund, had it had its aliquot share of the reserves, which I think *Local 50* teaches it had the right to have, that might not have happened.

THE COURT: You agreed in the collective bargaining agreement.

MR. SULDS: It is a three-year agreement, Judge. It is over now.

THE COURT: It is over now?

MR. SULDS: The three-year agreement has lapsed. There is new collective bargaining which has superseded that.

THE COURT: Is there a new agreement in effect?

MR. SULDS: No, it is still in the process of being hammered out.

THE COURT: Under the law, the old one is in effect until the new one replaces it.

[17] MR. SULDS: Except that we reached an impasse.

THE COURT: That may be, but some of your employees may decide to go to work for someone else and the solution will be academic.

MR. SULDS: You have asked me how the employees were harmed by not having a portion of moneys contributed on their behalf. What I am trying to tell you is because the Southern Funds didn't have sufficient reserves to continue one form of benefit, it was dropped. It was dropped across the table, it was dropped after collective bargaining, and it was dropped in the context of trustee discussions. That is one way.

Now, the potential for that happening—

THE COURT: But that injury results from the fact that the employer chose to set up his own fund and the union allowed you to do that.

MR. SULDS: Agreed. Just like in *Alvares*, which is so significant to the *Local 50* discussion.

THE COURT: But you are not aggrieved by their failure to set up transfer rules.

MR. SULDS: Judge, just let me ask—

THE COURT: How are the employees aggrieved by the failure to set up transfer rules?

MR. SULDS: They are aggrieved because moneys that were contributed on their behalf—

[18] THE COURT: Maybe you are not listening to what I am saying. Wherein does the failure to set up transfer rules connect to the obligation to transfer the funds?

MR. SULDS: Once the liabilities are transferred, as they have here—the Welfare Fund of Greater New York no longer provides welfare coverage. The Pension Plan of Greater New York no longer accrues service credit. Those are all liability questions.

THE COURT: What in the law would require them to set up a transfer rule—

MR. SULDS: Section 1414 of ERISA. It says they shall have those rules. That is what *Vornado* says, that you have a right to bring a lawsuit to compel them to do it.

THE COURT: Where in Section 1414 does it say that the transfer rules that they are obliged to set up would require them to transfer these funds? I missed it.

MR. SULDS: It does not say that it would require them to transfer the funds.

THE COURT: That is what I am asking about.

MR. SULDS: Excuse me. What it says, Judge Sprizzo, is, they shall have transfer rules such that assets shall follow liabilities. The issue in *Vornado* didn't have anything to do, as Mr. Rose has suggested, with whether or not there would be a transfer of liabilities. To the contrary—

[19] THE COURT: What about Section 1415? What is that designed for?

MR. SULDS: That has a mandatory triggering effect on the transfer of assets in one limited situation. It does not talk to the other situations, any one of a number of which are imaginable and one of which is presented in this case.

THE COURT: Is there any case authority for the proposition that ERISA, either Section 1414 or Section 1415, requires transfer rules directing a transfer of liabilities under the circumstances present in this case?

MR. SULDS: I think, fairly read, that is exactly what the *Vornado* case stands for.

THE COURT: I will look at the *Vornado* case, but *Local 50* doesn't deal with that.

MR. SULDS: No, it doesn't. It clearly doesn't, except to one extent. Judge, and if I can come back to that—

THE COURT: Did *Vornado* say they have no obligation to set up transfer rules?

MR. SULDS: I think if you read the *Vornado* case there were two steps. First, they brought a suit to have the asset transfer rules, and then there were asset transfer rules which limited transfers to 10 percent. *Vornado* was about a 75 percent contributor and said, "Hey, we don't want to take 75 percent of the liabilities and get [20] 10 percent of the assets," so they brought an action.

THE COURT: What kind of liabilities did *Vornado* assume?

MR. SULDS: It didn't assume any. That is the difference between that case and this. That is why that case doesn't teach us as much about this, except for the need to have transfer rules. *Vornado* said we are not going to take the liabilities unless we get a commensurate share of the assets.

THE COURT: Is that a voluntary transfer situation?

MR. SULDS: I think it was, because it didn't happen pursuant to collective bargaining. It didn't happen pursuant to collective bargaining at all. They went out of business.

THE COURT: It wasn't required by law.

MR. SULDS: That is correct.

THE COURT: Is there a case that says there is an obligation to set up transfer rules in situations—

MR. SULDS: Yes, *Local 50* says that specifically. Judge, you asked me if there is a case.

THE COURT: Is there a case which says that this statute, the one you are relying upon—

MR. SULDS: No.

THE COURT: —requires the setting up of [21] transfer rules where the transfer is required not by agreement or by decision of the parties but by law? There is something circular in saying that the law requires a transfer, therefore they should have transfer rules, when no one knows they have an obligation to set up transfer rules until some court tells them that they require it.



MR. SULDS: You are wrong on that. Look at 1414 to check me on that. The law says they shall have them. That covers any and all eventualities.

THE COURT: They shall have them even if they don't need them?

MR. SULDS: Even if they don't need them. It is a structural defect for them not to have those rules in effect, precisely because Congress couldn't envision all the reasons they would be necessary.

THE COURT: None of your parties are aggrieved by the failure to set up those rules. You all lack standing unless you can make that connection between the transfer rules that they should have set up and the transfer of the assets. That is the bottom line here.

MR. SULDS: Let me approach it this way, from the point of view of a participant in the fund, former participant in the fund. Section 1451 has this aggrieved notion, which is the basis on which some of our cases are brought.

[22] THE COURT: That is a general concept of standing.

MR. SULDS: It is. And the concept of standing, by the way, as you correctly noted, is a question of who gets in the courthouse door, who presents the case or controversy as such. So you are not going to issue an advisory opinion. You are not going to issue an advisory opinion in this case; that is quite clear. There are real disputed issues here.

THE COURT: But the question is whether or not the parties who are raising them have standing to raise those issues. In other words, if I grant you the relief which you claim you are entitled to, to wit, I directed the setting up of transfer rules, you have to demonstrate to me that that would in some way benefit you, and that is the connection you haven't made.

MR. SULDS: It will benefit everybody who is a plaintiff in the following ways.

THE COURT: How? Tell me how.



MR. SULDS: The plaintiff employees now have within the benefit funds which exist for—

THE COURT: You are getting to the conclusions before you get to the reason. Tell me why the setting up of transfer rules—

MR. SULDS: Your Honor, with all due respect—

[23] THE COURT: Wait. You are not answering my question. If you don't do it shortly, I am going to terminate your argument. My question is, make the connection between the obligation to set up transfer rules and the obligation to transfer the funds. That is what I am asking about. Don't answer some other question.

MR. SULDS: I thought I was answering your question, your Honor.

THE COURT: No, you weren't. Try again.

MR. SULDS: I will try my best.

THE COURT: This will be your last chance.

MR. SULDS: Yes, sir.

THE COURT: Try again.

MR. SULDS: With respect to the plaintiff employees, they are aggrieved because moneys that were contributed on their behalf to the old funds for the purpose of making sure both that their pensions would be there and that their welfare coverage would be there, moneys that were, in effect, a bank against the future—remember, we are only talking about reserves here, we are not talking about the moneys necessary to fund the ongoing liabilities, we are talking about the reserves; we are talking about a bank, that the union representing these employees took and banked in those funds rather than putting them in their pockets as wages—those moneys are [24] no longer available to them to bank them for the future.

THE COURT: You are missing the point again. My question is, why would the law require them to set up transfer rules—

MR. SULDS: We have those liabilities.

THE COURT: —which would require them to transfer those funds to your fund?

MR. SULDS: Because we have the liabilities. We have the liabilities. The Southern Funds currently provide welfare coverage. The Southern Funds with respect to those employees who did not vest in Greater New York have granted past service credit for all Greater New York service, and are now, regardless of whether they get the reserves or not, going to pay pensions based on that. And also, Judge, if I may—

THE COURT: You have some liabilities. The question is, do you have their liabilities?

MR. SULDS: Yes, absolutely.

THE COURT: Where do you have their liabilities?

MR. SULDS: In the pension area, with respect to those individuals who with us have completed service beyond that of the ten-year vesting period. Every additional year, as you know, under the schedule calls for additional payment. We are paying that, not them. The service was with us.

[25] THE COURT: But that was never their liability to begin with.

MR. SULDS: Judge, it would have been their liability had they not come out. You talk about contingent—

THE COURT: That is like saying if somebody quits a job and goes to work somewhere else, they would have had a liability if he hadn't quit. The only liability they have under their plan is based upon services for people who are participants in their fund while they are working for an employer. Once they leave that employer's employ or get connected to some other fund, they never have that liability. Their liabilities for that employee are frozen by the dictates of their own plan. You have assumed a liability, yes. The question is, have you assumed their liability? And I think the answer is no.

MR. SULDS: The collective bargaining agreement that is involved in this case, attached to the complaint as Exhibit A, provides on page 16 that these funds, the Southern Funds, are going to be set up, that the Southern employers are going to cease making contributions into the Greater Fund, and I am quoting, "There shall be a

continuity of benefits for employees to be covered by the Local 144-Southern Funds." As a matter of—

THE COURT: What does "continuity" mean to you?

MR. SULDS: "Continuity" means to me an [26] assumption of liabilities of the precise nature that we have.

THE COURT: It means that their liability will go to point A in time and you will pick it up from there.

MR. SULDS: But the liability is not divisible as to point A and point B unless you divide the reserves. Reserves are accumulated in a fund not only to accumulate with respect to everybody who vests as of today, but also to pay for people who continue to acquire service credits and those who will vest in the future. Those two categories of people are people we picked up.

THE COURT: The collective bargaining agreement does not state to them that we will assume these liabilities on that basis if you transfer the reserves.

MR. SULDS: We have already said that. It is in the record before you, in the minutes of the employees.

THE COURT: Not in the collective bargaining agreement.

MR. SULDS: No, because it needed their agreement.

THE COURT: And you wouldn't have received it. Having failed to negotiate that as part of the collective bargaining agreement, you now come in and say the law requires it anyway.

MR. SULDS: No, Judge, that is not at all it.

[27] THE COURT: It is pretty close.

MR. SULDS: No, I don't think so at all.

Let me return to the transfer of liabilities and transfer of assets definition you had before, and let me read further from where you were. "However, the shifting of assets and liabilities pursuant to a written reciprocity agreement"—exactly what you are saying we should have—"between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets and liabilities."

THE COURT: That cuts your throat.

MR. SULDS: I don't think so.

THE COURT: If it doesn't apply in a situation in which there is a reciprocal exchange of obligations, how could it possibly apply when there is not?

MR. SULDS: The point is that where there is no reciprocal agreement, there is a requirement of having asset transfer rules. That is what this definition says. Funds can do anything they want between themselves. That is not governed by the 1414 law.

THE COURT: But the other prong of your argument is that you assume their liabilities. If I reject that, you are out of court; is that correct? If I reject your argument that you have assumed their liabilities, not your own liabilities, you are out of court; right?

[28] MR. SULDS: I think you are probably right, Judge.

THE COURT: And I think I reject the argument, but I will think about it. I will look at *Vornado*.

Do you have anything else you want to tell me?

MR. SULDS: Yes, I would like to come back—

THE COURT: You have five more minutes to finish up.

MR. SULDS: I will take about two. I am sorry I am so long.

I just want to call your Honor's attention to a provision or part of the *Local 50* case. You seemed, when you came on the bench, to have concluded *Robinson* didn't apply. I don't know what else you had in mind with respect to my—

THE COURT: My problem was, I didn't understand why people were arguing *Robinson* when there did not appear to be any argument made that the collective bargaining was unreasonable.

MR. SULDS: It seemed to me, as I listened to Mr. Rose's argument, that you got into this notion that there was something that we were trying to grab that wasn't ours, and there was something improper or that we didn't

have a good claim, because of the notion that 302 and *Local 50* were inconsistent with ERISA.

[29] THE COURT: I said I am not sure they are inconsistent.

MR. SULDS: I think that that is the point. When you put together, Judge—

THE COURT: The only inconsistency may be the suggestion in *Local 50* that the funds paid by one employer may never be used for the benefit of employees other than its own. That is the one thing which may create the inconsistency, and I think the Second Circuit statement to that effect was well beyond what the case warranted, nor was it anything more than dictum in the context of that case.

MR. SULDS: I would like to read to you, if I may, what I think part of the holding of *Local 50* is—

THE COURT: Don't read it to me. I read it yesterday.

MR. SULDS: But it just has to do with the notion that the structural defect that they are talking about is the failure of the fund there to have a provision requiring transfers of assets under those circumstances.

THE COURT: But that is circular. Once they find—

MR. SULDS: But it is why there is no inconsistency with 1414.

THE COURT: *Local 50* does not deal with your [30] other argument, which is that the statute requires them to have a transfer rule, because that was not even involved.

MR. SULDS: There is no inconsistency. Quite to the contrary, they are completely consistent.

THE COURT: If I don't find an obligation to transfer the funds under the statute, then there would be no structural defect in the plan.

MR. SULDS: As I thought of it standing up here, Judge. I think that if you conclude that these Southern Funds have no liabilities which previously were those of the Greater New York Funds, that regardless of the



structural defect of not having the asset transfer rules, you are right, we are out of court.

THE COURT: That is what I have been trying to say.

MR. SULDS: I did not understand what you were saying before.

THE COURT: I thought you didn't understand what I was asking you.

MR. SULDS: It may take me a long time.

THE COURT: All I am saying to you is that if there is no obligation to transfer the funds, then there is no structural defect in the plan, number one—

MR. SULDS: There continues to be a structural defect.

[31] THE COURT: Not unless there is an obligation to transfer the funds.

MR. SULDS: I am sorry, I am thinking of the 1414 rule structure defect.

THE COURT: If there is no requirement that they transfer the funds under Section 302(c)(5), there would be no structural defect in the plan of the type that the Court of Appeals found in *Local 50*. If there is no obligation to transfer the funds, then any failure to comply with Section 1414 by having a transfer rule would not have in any way aggrieved these parties. In other words, your standing depends upon the obligation to transfer the funds. So I say the same issue cuts across both.

MR. SULDS: I think what you are saying is that the standing depends on whether the Southern Funds in fact have assumed the liabilities, because if they have, then everything falls back into place.

THE COURT: It depends upon whether there is an obligation to transfer the funds.

MR. SULDS: One follows from the other, as I understand what you are saying.

THE COURT: You say the fact that they have assumed the liabilities requires them to transfer the funds. I agree with that. If they have an obligation to transfer the funds, then the failure to set up transfer rules which [32] would require the transfer of the reserves would



aggrieve your parties. I don't have any problem with that.

MR. SULDS: Judge Sprizzo, you have been very patient, but one more—

THE COURT: The bottom line is: If there is no legal obligation to transfer these funds or these reserves to you or to your fund, then there isn't any ERISA violation here, there isn't any *Local 50* violation here, there isn't anyone aggrieved.

MR. SULDS: I think that *Local 50* creates the obligation to transfer the funds. I am not arguing with that.

MR. SULDS: And I think, from what you were saying, you and I are saying the same thing. That is, to the extent the Southern Funds have picked up those liabilities, there then becomes an obligation to have had asset transfer rules.

THE COURT: The failure to have transfer rules has no impact unless they have to transfer the reserves to you.

There is only one portion of their argument that I want you to respond to, which is that the transfer of these reserves to you would put them in violation of ERISA, and they would then be giving the benefits of the fund to people other than plan participants, which they say the law [33] forbids. That is their argument.

MR. SULDS: It is a good argument if we don't have liabilities. It all turns, doesn't it, Judge, on whether or not these Southern Funds picked up plan liabilities from Greater New York. If we picked up plan liabilities, then the transfer of assets is going to follow those liabilities. Remember, this is going to be held in trust pursuant to 302. It is not as though employers are going to grab it and put it in their pockets.

If there are liabilities that have come to my side of the table, then they are wrong. If there are no liabilities that have come to my side of the table, then they are right. So if I may just take one minute with respect to the liability question, Judge, because, as we discuss it here, it seems to me that the fulcrum on which your decision

is going to turn is going to be whether or not the Southern Funds had adequately picked up liabilities to the extent that it triggers all the rest.

THE COURT: Their liabilities.

MR. SULDS: Their liabilities, their liabilities. There are three types of liabilities that were involved in the Greater New York situation. One was welfare liabilities. They had an obligation to continue providing welfare coverage to those employees in covered employment. The employees involved in this case, the Southern New York [34] employees, now have their welfare coverage provided under the Southern Welfare Plan. They didn't say anything about that. Their collective bargaining agent took them from one plan to another. That was what the agreement was. That agreement is in front of you. There is a dispute, to be sure, about how that agreement came to be made, but the agreement is in front of you, and the agreement says you are going to cease making contributions into Greater New York and you are going to make them into Southern New York. And it says that in the context of a continuity of liabilities.

THE COURT: But the fund never had any liability for welfare benefits for people after they left the fund.

MR. SULDS: But the way in which they left the fund was the product of collective bargaining, Judge, and therefore the collective bargaining occasioned the assumption by Southern New York of the liability to provide the welfare coverage.

THE COURT: But you insisted on going to another fund. You could have stayed in the same fund.

MR. SULDS: The union agreed with us.

THE COURT: But it was not their suggestion; it was yours. In fact, the union was very clear—

MR. SULDS: There are reserves—

THE COURT: No, no. What the union bargained [35] for was, if they were going to agree to your demand that you have your own fund, that that new fund not prejudice the employees because those benefits should be

at a level commensurate with those provided by the old fund. But nothing in that suggests that this fund has any liability whatsoever with respect to people who leave the fund.

MR. SULDS: Judge, the one thing that I don't understand in your approach to the case—and I am an advocate and maybe I am being intentionally obtuse, I don't think so—is this.

THE COURT: Is it better to be intentionally obtuse or unintentionally obtuse?

MR. SULDS: At least, before you thought I was unintentionally obtuse, so now I am giving myself the benefit of the doubt. On top of that, obtuseness is not what I had in mind today. We had the Greater New York Fund, and they contain within their corpus, within their reserves, substantial sums of money contributed by Southern employers on behalf of Southern employees. They have no continuing obligations to those Southern employees, except with respect to those Southern employees who service enough time under the Greater Funds to have vested.

THE COURT: Or come back.

MR. SULDS: No. You know, it is three years. There is a break in service law that has to apply somewhere.

[36] THE COURT: If they go back and work for an employer—

MR. SULDS: It has not been attacked, as far as I understand, the break in service rules.

THE COURT: If your welfare benefits get small enough, these people will leave you and work elsewhere.

MR. SULDS: They may do that, but we still are going to have a collective bargaining relationship with the union.

THE COURT: If your welfare benefits are less than other employers provide, they are going to work for another employer.

MR. SULDS: Judge, you may know more about it than I do. We haven't dropped off anybody in terms of employment yet. Maybe it will happen.

THE COURT: Have you cut back on their welfare benefits yet?

MR. SULDS: I just told you that we have had to change the whole configuration. We now have a co-pay option with respect to it.

THE COURT: You reached an impasse on that.

MR. SULDS: The trustees put into place a new welfare plan, which has a co-pay option with respect to some coverage that was previously fully funded with the plan.

[37] THE COURT: So if any employee doesn't like that, they can go work elsewhere.

MR. SULDS: Maybe so. I don't know. But the thing that seems to me to be the principle upon which *Local 50* is focused, upon which *Alcares* is focused, and the other cases in this area, and the reason that 1414 of ERISA mandates that there shall be asset transfer rules, is that it is improper, once the contributions in a global kind of sense—I can't give you a case on this, this is a feeling—it is improper, once these contributions have been made, to let them stay over here where, in the banking concept, they properly belong where the benefits are being provided. That is what this case is all about. It is this banking concept. It is reserves, Judge.

THE COURT: If that banking concept is adopted, that is the end of multiemployer funds.

MR. SULDS: How?

THE COURT: Because every time one employer decides to set up his own fund, you have a fragmentation of funds. I think he has an argument that Congress spent a lot of time addressing the problems of multiemployer funds. They put in a withdrawal liability provision, they put in a lot of provisions dealing with the regulation of multiemployer funds.

MR. SULDS: Including 1414.

[38] THE COURT: And I would think there was something in the legislative history that would indicate that when one employer leaves a fund and sets up his own bargaining unit and his own fund, Congress might have dealt with that.

MR. SULDS: Judge, I contend that 1414 is the catch-all under ERISA designed to deal with that. The legislative history we have cited to you. I would like to just underscore that it is real official legislative history.

THE COURT: If they have provided in 1415 for a mandatory transfer of funds where the collective bargaining did not extend the other situation—

MR. SULDS: It was because of the need to dovetail it with requirements under the Taft-Hartley Act. You could not, under 302, continue to be making contributions to one multiemployer fund where the employees were not represented by that labor organization any longer.

THE COURT: But why require a transfer of assets?

MR. SULDS: Because it was necessary as a result of 302. The two statutes have to be read in harmony.

THE COURT: Congress passed 1415 because 302 required it?

MR. SULDS: I believe that's right.

THE COURT: Then it is—

[39] MR. SULDS: And that brings the harmony to *Local 50*.

THE COURT: Your argument is that 302 requires more than 1415 requires. You are saying to me that 1415 is there because you want to effectuate 302, which doesn't make any sense.

MR. SULDS: Judge, you can distinguish *Local 50* as they have attempted to do on the facts that that involved decertification and this involves collective bargaining. I suggest to you that if that is what the Second Circuit had in mind, it would not have so heavily relied upon *Alvares*, which is the same case as this, the Ninth Circuit case. I mean, that seems to me the hard case here from their point of view.



THE COURT: *Local 50* did not require a situation where the transfer of the assets might put them in violation of ERISA, because the funds would be put to the benefit of the employer, not the employees.

MR. SULDS: But no employer can have the benefit of these funds under the relief we seek.

THE COURT: Certainly, if I relieve your obligation with respect to what you agreed to do—

MR. SULDS: Any time there is a change in what the contribution rate is, whether it is up or down, it is the product of collective bargaining.

[40]- THE COURT: We have fully explored this. We have been here for an hour and five minutes. One brief rebuttal, one minute.

MR. ROSE: I note that counsel said we assumed the liabilities. None of the plaintiffs assumed any of the liabilities. Southern Funds aren't even parties here.

MR. SULDS: I misspoke myself.

MR. ROSE: I would urge the Court—

THE COURT: Southern Fund is not a party here? The trustees represent the fund, don't they?

MR. ROSE: No, they do not represent the funds. That is quite clear in the record of this case. The funds have not voted to become parties in this case.

MR. SULDS: That is the management trustees. I don't represent the union trustees.

MR. ROSE: That's right, he does not represent the fund at all in this case. I would urge the Court—

THE COURT: Nobody has assumed any liabilities. But that doesn't affect anything.

MR. ROSE: As a matter of fact, your Honor, in the case of the pension plan, there was over a year's hiatus between the time that they withdrew from the Greater New York Pension Fund and established their own. They didn't establish—

THE COURT: But if there was an assumption of [41] liabilities, the fact that they have not joined the



action doesn't affect anything. Either the law requires a transfer or it doesn't.

MR. ROSE: I had material I think is very important, but—

THE COURT: Let me just tell you, before you do that, that with respect to the summary judgment motions as to the counterclaims, I am going to deny those motions. I think there are factual issues to be resolved as to what the extent of the liabilities is. They claim they haven't had an audit. Those motions are all going to be denied.

With respect to intervention, I don't think intervention is authorized under the statute in a situation such as this. If you want to bring a separate action and consolidate it, you can. I don't think intervention is appropriate.

MR. ROSE: Let me mention something in connection with the counterclaims, if I may. I haven't been heard on that. Your Honor has already—

THE COURT: I read the papers. I don't need argument. I say I think there are factual issues; I can't grant summary judgment. The extent of the liability on the counterclaims, how much is owed, I think I can deny on the motion papers I now have. I am denying those motions without prejudice.

[42] MR. ROSE: We said in our papers you can't determine the exact amounts. That is why we suggested reference to a magistrate.

THE COURT: Why refer it to a magistrate? I can resolve it.

MR. ROSE: But on the issue of liability, your Honor, you have already issued an order defaulting them.

THE COURT: There is no question they are liable for the payments, but they dispute the amount.

MR. ROSE: That is correct. And all we ask is that it be referred—

THE COURT: Entering a judgment on liability doesn't get anybody anywhere. We just have to compute the amount.

MR. ROSE: I think it does. It gets us to the point—

THE COURT: It is academic, isn't it?

MR. ROSE: No, I don't think so, your Honor.

THE COURT: You can't get a judgment on it. What is the point of a judgment saying they are liable? They admit liability for the payment. They dispute the amount. Isn't that clear?

MR. ROSE: Your Honor, it makes a big difference—

THE COURT: You don't dispute your obligation—

MR. SULDS: To the extent that they arose under [43] the collective bargaining agreement. I don't know from the papers, and I don't think you can know, whether there are any periods that are claimed after the impasse occurred which would be the subject of ERISA.

THE COURT: We will have discovery on that.

MR. SULDS: We haven't had discovery.

THE COURT: Come back to me later. For the moment I am denying it without prejudice.

MR. ROSE: There is no claim here, your Honor, of lack of liability.

THE COURT: He is now saying he doesn't dispute liability for any payments which accrued while the collective bargaining agreement was in effect. He just doesn't know that the moneys you are claiming are within that category. Let's have discovery on that question.

MR. SULDS: And as to the amounts as well, your Honor.

THE COURT: That's right. Then we will resolve that later. There is no reason to resolve it now. Intervention is not appropriate on behalf of the person against whom he discontinued, because that claim is not common to any issues raised by the motions in front of me. If they want to bring a separate action, they can. I don't think it is a case I can consolidate. The factual predicate for the intervening parties' claim for funds is [44] totally separate and apart from any issues I am resolving in this case.

MR. ROSE: Your Honor, let me point out, the only reason we had an intervention situation in here at all is because the plaintiffs—

THE COURT: Sued you.

MR. ROSE: Wait a minute. —sued us in connection with three multi—

THE COURT: What I am saying is, they are permissive counterclaims; they are not compulsory counterclaims. I think that is clear. Once the plaintiff discontinues against that person as a defendant, any basis for the exercise of jurisdiction over permissive counterclaims disappears. Intervention is not an appropriate way to get a permissive counterclaim back before the Court, because by its very definition a permissive counterclaim does not come out of the factual core which is before the Court to begin with. A defendant is allowed to put it in because a defendant is allowed to put in any claim, whether it arises from the transaction or not, as a permissive counterclaim. But a permissive counterclaim does not arise out of the transaction sued upon; therefore it is not an appropriate subject for intervention. There is no reason why you can't bring a separate suit for that. Go right ahead.

[45] MR. ROSE: May I use a minute to rebut the main argument?

THE COURT: Yes.

MR. ROSE: I would urge the Court to read two affidavits that are in the record, one by Professor Dan McGill, the outstanding scholar in pension matters in this country, who is at the Wharton School of Finance, and the other affidavit I would urge the Court to read carefully is that of Mr. Higgs, who is an officer of the Martin Siegel (sic) & Company. That is the company that is the pension consultant to more multiemployer plans than anybody else. In fact, the multiemployer plans they are consultant to are about half of the participants in all of the multiemployer plans in the country. And he explains very carefully there why it would undermine on insur-

ance principles to allow money to go to a withdrawing employer back from a fund.

Furthermore, there is a nice—

THE COURT: It doesn't have anything to do with the law.

MR. ROSE: But it tells how this fund actually works.

THE COURT: I understand that. The fact that it would undermine insurance principles, etc., is not particularly relevant to the question of whether the law requires it.

MR. ROSE: In this sense it is, your Honor, and [46] I would suggest it is very important: Congress was aware that this is the way multiemployer plans work when they legislated, and they did it with that backdrop. The legislative history is clear that that is so.

THE COURT: I will reserve decision, look at the *Vornado* case, and write an opinion. Your papers may be long, but the bottom line is very simple: either Section 302 forbids an employer fund from using funds contributed by one employer for the benefit of employees of other employers or it does not. If it does, then the retention of these reserves would be in violation of that statute.

The second question is whether or not any obligation to use the funds for that purpose, and under the case law in *Alvares* that says you measure it not just at the time of the establishment but later, has been overridden by the comprehensive regulatory scheme set forth in ERISA, and whether or not, in view of the statute as it now exists, Section 302 can be read to imply an obligation to transfer these reserves under circumstances in which, you argue, the transfer of these reserves would itself be in violation of ERISA, since it would give the benefit of reserves to people who are not plan participants. I think that is a good argument and I will consider it.

The third aspect of this case is whether or not, under the multiemployer act, the statute requires you to [47] set up transfer rules and, had you set up those transfer

rules, whether you would have been obligated to set up transfer rules which would require you to transfer these funds. If you were not obligated to set up transfer rules which would have required you to transfer these funds, then nobody suing here would be aggrieved by your failure to set up transfer rules and you would lack standing to raise that issue. The issue of whether you have an obligation to set up transfer fund rules which would require the transfer of these funds is going to turn upon whether, under the statute, there has been an assumption of liabilities which would trigger your obligation to set up transfer rules. That is as simple as I can make it.

I have a grasp of the issues, and I will reserve decision on it.

MR. SULDS: Thank you for your time, Judge.

MR. ROSE: Thank you.

THE COURT: I think it is an interesting case, but, however I resolve it, the Second Circuit will get another crack at it. I think for the moment you have the better of the arguments. I may change my mind when I look at these cases.

MR. SULDS: I certainly hope so.

THE COURT: Have a good day.



**Exhibit 1****Defendants' First Set of Interrogatories  
and Request for Production of Documents**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**DEFENDANTS' FIRST SET OF INTERROGATORIES  
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Defendants, by their undersigned counsel, direct this First Set of Interrogatories and Request for Production of Documents ("Interrogatories") to plaintiffs. The interrogatories are to be answered, and documents produced, in accordance with the applicable Federal Rules of Civil Procedure and Rules of Civil Procedure for the Eastern and Southern Districts of New York.

The documents requested are to be produced for inspection and copying at 10 a.m. on February 9, 1987 at the offices of Epstein Becker Borsody & Green, P.C., 1140 19th Street, N.W., Washington, D.C. 20036, or, in the alternative, plaintiffs may, on or before February 9, 1987, provide true copies of the requested documents to defendants' counsel.

The Interrogatories shall be deemed continuing, thus requiring plaintiffs to supplement their responses promptly upon acquisition of additional information, as required by Federal Rules of Civil Procedure 26(e).

The Interrogatories are to be answered in accordance with the DEFINITIONS, numbers 1 through 4 inclusive



set forth at page 2 and in accordance with the INSTRUCTIONS set forth at pages 3 through 5 inclusive.

### DEFINITIONS

1. "Documents" refers to the following materials whether or not within the possession, custody or control of the defendants:

(a) Writings or printed matter of every kind and description including, but not limited to, memoranda, correspondence, photographs, drawings, blueprints, graphs, charts, telegrams, letters, contracts, diaries, notes, literatures and minutes, as well as drafts, copies, transcripts and summaries of any of the foregoing; and

(b) Recordings and all other nonwritten forms including, but not limited to, tapes, disks and other data compilation, mechanical or otherwise.

2. "Person" refers to any individual, association, partnership, corporation, trust, governmental agency, or other entity.

3. "Employee" or "employees" refers to any present or former employee or employees.

4. "He" or "his" shall be read to refer, where applicable, to the feminine, "she" or "her."

### INSTRUCTIONS

1. Where asked to identify an individual person, state that person's:

(a) Full name;

(b) Present or last known residence address; and

(c) Present or last known business address and position.

2. Where asked to identify an entity other than an individual person, state its:

- (a) Full name; and
- (b) Present or last known address.

3. Where asked to identify a document, include where applicable, the following information:

- (a) The type of document, *i.e.*, letter, memorandum, note, etc.;
- (b) The date that the document was prepared;
- (c) The document's author(s) or the person(s) who prepared or compiled it;
- (d) the person(s) to whom the document was addressed and sent;
- (e) The document's present location and custodian;
- (f) The disposition made of the document, if it was in your possession and control but is no longer; and
- (g) The date that the document was destroyed, and the reasons therefore.

4. Where asked to identify a communication, include the following information:

- (a) The manner of such communication, *i.e.*, oral, written, telephone call, etc.;
- (b) The person or persons making each such communication;
- (c) The person or persons to whom each such communication was made;
- (d) All persons present at the time of each such communication;
- (e) The date and time of such communication;
- (f) The place where such communication was made or held; and
- (g) The substance of each such communication.

5. If you object to an Interrogatory on the basis of privilege, state in detail the facts on which you base your objections.

6. The instructions and definitions which precede these Interrogatories are an integral part hereof, and information requested in each Interrogatory includes all information called for by reference to the instructions and definitions.

7. Whenever the word "identify" is used with reference to a person or a document identified in a previous answer, it shall be sufficient to state his, her or its name or title and refer to the answer in which he, she or it was previously identified.

8. Where applicable, information sought by an Interrogatory may be furnished by reference to another answer, but separate answers should be given in all cases, and Interrogatories should not be joined together and accorded a common answer.

9. Where exact information cannot be furnished, estimated information should be supplied to the best extent possible. Where estimated information is used, it should be so indicated and an explanation given as to the source and basis of the estimate.

### *INTERROGATORIES AND REQUESTS*

1. Do the management trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund ("Southern Pension Fund") and Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund ("Southern Welfare Fund") (collectively "Southern Funds") named in paragraph 2 of the Third Amended Complaint represent either or both of the Southern Funds in this litigation? If the answer is yes:

a. Identify the documents, communications or any other actions by which one or both of the Southern Funds authorized such representation;

b. Provide all documents identified in (a).

2. Do the management trustees of the Southern Funds referred to in Interrogatory 1 assert, for purposes of this lawsuit, that they are fiduciaries of the Local 144 Nursing Home Pension Fund ("Greater New York Pension Fund") or the New York City Nursing Home-Local 144 Welfare Fund ("Greater New York Welfare Fund") (collectively, "Greater New York Funds")? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide all documents relied upon to establish their fiduciary status.

3. Do the plaintiffs referred to as "Employers" in paragraph 4 of the Third Amended Complaint assert, for purposes of this lawsuit, that they are fiduciaries of the Greater New York Pension Fund or the Greater New York Welfare Fund? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide the documents relied upon to establish their fiduciary status.

4. Do the plaintiffs referred to in paragraph 5 of the Third Amended Complaint assert, for purposes of this lawsuit, that they are fiduciaries of the Greater New York Pension Fund or the Greater New York Welfare Fund? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide the documents relied upon to establish their fiduciary status.

5. Referring to paragraph 21 of the Third Amended Complaint, and the example of "assumption of liabilities" given there, is the amount of benefits that the Greater New York Pension Fund is obligated to pay any different as a result of the Southern Pension Fund's "assumption of liabilities" than it would be without such assumption? If the answer is yes:

a. Identify the provisions of plan or trust documents, or of any other authority, that would obligate the Greater New York Pension Fund to make any payment on account of unvested benefits;

b. Provide the documents or portions of documents identified in (a).

6. Referring to paragraph 21 of the Third Amended Complaint, state the authority in ERISA or any other law under which funds held by the Greater New York Pension Fund are "attributable" to contributions made by particular employers, and the specific consequences that attach to "attributable" funds.

7. Referring to paragraph 22 of the Third Amended Complaint, state the authority in ERISA or any other law under which funds held by the Greater New York Welfare Fund are "attributable" to contributions made by particular employers, and the specific consequences that attach to "attributable" funds.

8. Referring to paragraphs 31, 36 and 45 of the Third Amended Complaint, state the authority in ERISA or any other law under which "corresponding liabilities" are assigned to certain contributions to a multiemployer plan, and the specific consequences that attach to "corresponding liabilities."

9. Referring to paragraph 21 and to paragraph 31, 36 and 45 of the Third Amended Complaint, state (i) what is the effect of the alleged "Southern Pension Fund's assumption of the Greater New York Pension Fund's



unvested liabilities for the past service credits of all participants in the Southern Funds" and (ii) what are the "corresponding liabilities" assumed by the Southern Pension Fund, in the following examples? Both examples deal with an unvested participant with nine years of service credit in the Greater New York Pension Fund who becomes a participant in the Southern Fund when his employer withdraws from the Greater New York Pension Fund and joins the Southern Pension Fund. Thereafter:

a. The employee leaves employment with the Southern employer without completing another year of service, is employed (beginning less than nine years after his last year of service in the Greater New York Pension Fund) for five years of service with an employer who contributes to the Greater New York Pension Fund, and then retires.

b. The employee continues employment and completes five years of service while the employer is a contributor to the Southern Pension Fund, then leaves that employment, is employed (beginning less than nine years after his last year of service in the Greater New York Pension Fund) for five years of service with an employer who contributes to the Greater New York Pension Fund, and then retires.

In both 9(a) and (b), the employee has 14 years of benefit credit in the Greater New York Pension Fund at retirement.

10. Has any claim for benefits made by an employee who is a plaintiff in this case for hours of service worked before April 1, 1984 or in the period May 16, 1984 to June 30, 1984, inclusive, been denied by one or both of the Greater New York Funds for the reason that the liability has been assumed by the corresponding Southern Fund? If the answer is yes:

a. Identify each claim, with date filed, name of employee(s), and date of denial;



b. Provide all claims identified in the answer to (a), and all correspondence, legal pleadings, notes or minutes of meetings, or other relevant documents between the claimant and the Greater New York Funds and their respective counsel or other representatives.

11. Referring to page 2 of Exhibit E to the Third Amended Complaint, which reports the Southern trustees' decision to have a Defined Benefit Pension Plan draft produced, has a Defined Benefit Pension Plan been created? If the answer is yes:

a. Provide the Plan, with all amendments;

b. Provide all documents filed on behalf of the Plan with the Secretary of Labor, the Secretary of the Treasury and the Internal Revenue Service.

12. a. Provide the welfare plan adopted by the Southern Welfare Fund, with all amendments.

b. Provide all documents filed on behalf of the Plan with the Secretary of Labor.

13. Have affected employees been given notice by the Southern Funds of the pension and welfare plans referred to in Interrogatories 11 and 12? If the answer is yes, provide all documents that transmitted such notice, including, but not limited to, Summary Plan Descriptions.

14. Do the plaintiffs claim that one or both of the Greater New York Funds have taken any action to transfer, to one or both of the Southern Funds, liabilities imposed by a trust document, collective bargaining agreement or other governing document? If the answer is yes:

a. Identify and describe the action(s) taken, including identification of all documents relating to such actions;

- b. Provide any documents identified in (a).

Interrogatories 15-16 refer to paragraph 38 in the Third Amended Complaint.

15. Is a benefit to which an employee is "entitled" always a "nonforfeitable" benefit as defined in ERISA (without regard to any other attributes that may be indicated by the word "entitled")? If the answer is no, state the conditions that may be imposed on a benefit to which an employee is "entitled" that may not be imposed on a "nonforfeitable" benefit under ERISA.

16. List every "loss" of benefits by employees who are plaintiffs in this case to which they are presently "entitled" under one or both of the Southern plans. For each "loss," provide the following:

a. A description of the specific facts constituting the "loss";

b. All documents that establish the existence and nature of the "loss";

c. Which plaintiffs suffered the "loss"; and

d. The exact amount of the "loss" to each, if the amount was not disclosed in the answer to (a) or (b) of this interrogatory.

17. Is a benefit to which plaintiff employees "may become entitled" always *not* a presently "nonforfeitable" benefit as defined in ERISA?

a. If the answer is yes, state (1) the authority in ERISA or any other law that confers present rights to the forfeitable (unvested) benefits to which plaintiff employees "may become entitled" and (2) the nature of such rights;

b. If the answer is no, state the conditions under which an employee would have a nonforfeitable benefit to which he is not presently "entitled."

18. List every "loss" of benefits by employees who are plaintiffs in this case to which they "may become entitled" under one or both of the Southern Plans. For each "loss," provide the following:

a. A description of the specific facts constituting the "loss";

b. All documents that establish the existence and nature of the "loss"; and

c. The names of the plaintiff(s) who suffered the "loss."

19. List every act or omission of the defendants which adversely affected any plaintiff. For each act or omission, provide the following:

a. A description of the specific facts constituting the act or omission;

b. All documents that establish the existence and nature of the act or omission, including but not limited to trustee resolutions, notes of meetings or amendments to trust documents;

c. The names of the plaintiff(s) who were adversely affected by the act or omission;

d. A description of the specific facts constituting the adverse effect; and

e. All documents that establish the existence and nature of the adverse effect, including but not limited to rejections of claims for benefits to which a plaintiff was entitled from one or more of the Greater New York Funds or Southern Funds.

Dated: January 8, 1987

EPSTEIN BECKER BORSODY  
& GREEN, P.C.

By: /s/ Henry Rose  
HENRY ROSE  
250 Park Avenue  
New York, New York 10177-0077  
(212) 370-9800  
  
1140 19th Street, N.W.  
Washington, D.C. 20036  
(202) 861-1874

By: /s/ Harry N. Turk  
HARRY N. TURK  
250 Park Avenue  
New York, New York 10177-0077  
(212) 370-9800  
Attorneys for Defendants

(Affidavit of Service by Mail Omitted in Printing)

**Exhibit 2**

**Response of Plaintiffs to Defendants'  
First Set of Interrogatories**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(Title Omitted in Printing)

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**RESPONSE OF PLAINTIFFS TO DEFENDANTS'  
FIRST SET OF INTERROGATORIES**

Plaintiffs respond to Defendants' First Set of Interrogatories as follows:

*RESPONSE TO INTERROGATORY NO. 1:*

The plaintiff management trustees have commenced this action in their fiduciary capacity on behalf of the Southern Funds and the participants and beneficiaries thereof. The action is expressly contemplated by the Employers' and/or Management Companies' collective bargaining agreements with Local 144 pursuant to which the Southern Funds were established. Although the union trustees of the Southern Funds—Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney—have elected not to become plaintiffs to this action, they have stated that they do not oppose the management trustees in proceeding with the litigation.

a. & b. See documents supplied herewith.

*RESPONSE TO INTERROGATORY NO. 2:*

No.

*RESPONSE TO INTERROGATORY NO. 3:*

No.

*RESPONSE TO INTERROGATORY NO. 4:*

No.

*RESPONSE TO INTERROGATORY NO. 5:*

Yes. First, the amount of benefits that the Greater New York Pension Fund must pay to those participants who vested before commencing participation in the Southern Pension Fund, has been reduced as a result of the establishment of the Southern Pension Fund. For example, an employee with twenty-five years of credited service—seventeen years under the Greater New York Pension Fund and eight years under the Southern Pension Fund—shall receive the maximum \$350 per month benefit as follows: 17/25 from the Greater New York Pension Fund and 8/25 from the Southern Pension Fund.

Second, while it is true that the Greater New York Pension Fund has no obligation to pay unvested benefits, the Southern Pension Fund's "assumption of liabilities" has also reduced the amount of benefits that the Greater New York Pension Fund might ultimately have been required to pay. Specifically, the Greater New York Pension Fund has been relieved of its unvested liability to each of its participants who commenced participation in the Southern Pension Fund without having first satisfied the Greater New York Pension Fund's ten year vesting requirement. Therefore, regardless of how the Greater New York Pension Fund might otherwise have applied its break-in-service rules, it no longer must recognize the prior service credits of these participants. Such prior service credits are recognized instead under the Southern Pension Fund.

a. & b. There are no documents obligating the Greater New York Pension Fund to pay unvested benefits.



*RESPONSE TO INTERROGATORY NO. 6:*

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The Greater New York Pension Fund is a jointly trustee, multi-employer trust fund created and existing pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). As a condition of its continued qualification under Section 302(c)(5), contributions paid to the Greater New York Pension Fund by any employer must be used "for the sole and exclusive benefit of the employees of such employer." Thus, in order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the contributions made by each contributing employer. Further, the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer. Whenever all of the employees of any particular contributing employer are transferred to another pension trust fund, which assumes the liability for the employees past service credits, the Greater New York Pension Fund must transfer thereto that portion of the assets which are attributable to contributions made by that contributing employer. Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made. See *Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984).

Similarly ERISA mandates that the fiduciaries of an employee benefit plan, such as the Greater New York Pension Fund, administer the plan solely in the interest of the participants and beneficiaries and for the exclu-

sive purpose of providing benefits to those participants and beneficiaries. 29 U.S.C. § 1104. Fiduciaries are thus prohibited from preferring one group of participants over another or administering the fund in an arbitrary and capricious manner. Accordingly, a fiduciary breaches his/her duties under ERISA when he/she allows the fund to retain assets attributable to contributions by a particular employer when all the employee/participants of that employer have transferred to another employee benefit plan which has assumed the corresponding liabilities.

In order to ensure compliance with this obligation, Section 1414 was added to ERISA, requiring each employee benefit plan to adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities. Thus, the trustees of the Greater New York Pension Fund have breached their fiduciary duties as they concededly have not adopted such asset transfer rules.

#### *RESPONSE TO INTERROGATORY NO. 7:*

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The Greater New York Welfare Fund is a jointly trustee, multi-employer trust fund created and existing pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). As a condition of its continued qualification under Section 302(c)(5), contributions paid to the Greater New York Welfare Fund by any employer must be used "for the sole and exclusive benefit of the employees of such employer." Thus, in order to comply with Section 302(c)(5), the Greater New York Welfare Fund must recognize that its assets are attributable, in corresponding amounts, to the contributions made by each contributing employer. Further,

the Greater New York Welfare Fund must utilize those assets solely to benefit the employees of each particular contributing employer. Whenever all of the employees of any particular contributing employer are transferred to another welfare trust fund, which assumes the liability for providing coverage to these employees, the Greater New York Welfare Fund must transfer thereto that portion of the assets which are attributable to contributions made by that contributing employer. Otherwise, the Greater New York Welfare Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made. See *Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984).

Similarly ERISA mandates that the fiduciaries of an employee benefit plan, such as the Greater New York Welfare Fund, administer the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to those participants and beneficiaries. 29 U.S.C. § 1104. Fiduciaries are thus prohibited from preferring one group of participants over another or administering the fund in an arbitrary and capricious manner. Accordingly, a fiduciary breaches his/her duties under ERISA when he/she allows the fund to retain assets attributable to contributions by a particular employer when all the employee/participants of that employer have transferred to another employee benefit plan which has assumed the corresponding liabilities.

In order to ensure compliance with this obligation, Section 1414 was added to ERISA, requiring each employee benefit plan to adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities. Thus, the trustees of the Greater New York Welfare Fund have breached their fiduciary duties as they concededly have not adopted such asset transfer rules.

*RESPONSE TO INTERROGATORY NO. 8:*

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The authority under which "corresponding liabilities" are assigned to certain contributions to a multiemployer plan and the specific consequences that attach are the same as those identified in response to Interrogatories 6 and 7.

*RESPONSE TO INTERROGATORY NO. 9:*

a. & b. This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The Southern Pension Fund has assumed the Greater New York Pension Fund's unvested liability for the nine years' past service credit of both hypothetical employees. Therefore, Employee B will be entitled to pension benefits from the Southern Pension Fund on the basis of fourteen years of credited service. Employee A has not yet vested under the Southern Pension fund. However, if he/she should subsequently complete one or more years of credited service under the Southern Pension Fund so as to satisfy the Fund's ten year vesting requirement, at retirement he/she will receive benefits from the Southern Pension Fund. These pension benefits would be based upon the aggregate of his/her years of credited service under the Southern Pension Fund and his/her previous nine years of credited service under the Greater New York Pension Fund.

The plaintiffs are unaware as to how the Greater New York Pension Fund will apply its break in service rules to these hypothetical employees. The plaintiffs have been informed by the counsel for the Greater New York Pen-

sion Fund that it will not grant such employees credit for service under the Southern Pension Fund. Moreover, under any circumstances, the Southern Pension Fund has assumed the Greater Pension Fund's unvested liability to all of its participants who on December 1, 1985 became participants in the Southern Pension Fund.

*RESPONSE TO INTERROGATORY NO. 10:*

None of the plaintiff employees have made a claim to the Greater New York Pension Fund on the basis of service during the indicated periods. Nor have any of the plaintiff employees made a claim to the Greater New York Welfare Fund on the basis of such service which was denied on the ground that the Southern Welfare Fund had assumed the liability. The Southern Welfare Fund did not assume coverage of the plaintiff employees until its establishment on December 1, 1985.

*RESPONSE TO INTERROGATORY NO. 11:*

Yes.

a. & b. See documents supplied. The Plan Document is being prepared, and a copy will be supplied when it is completed.

*RESPONSE TO INTERROGATORY NO. 12:*

a. & b. See documents supplied. The Plan Document is being prepared, and a copy will be supplied when it is completed.

*RESPONSE TO INTERROGATORY NO. 13:*

Yes. See documents supplied herewith. The Summary Plan Description for the Southern New York Pension Fund is being prepared, and a copy will be supplied when it is completed.



*RESPONSE TO INTERROGATORY NO. 14:*

The plaintiffs do not contend that the Greater New York Funds have taken any action to transfer liabilities. Rather, the plaintiffs state that the Southern Funds have assumed, in accordance with the collective bargaining agreements by which they were established, certain liabilities of the Greater New York Funds.

Specifically, the Southern Pension Fund has assumed the Greater New York Pension Fund's unvested liability for the past service credit of all participants in the Southern Funds. Further, as to those employees who vested under the Greater New York Pension Fund, the Southern Pension Fund will pay them pension benefits on the basis of their additional years of service. Therefore an employee, who retires with thirteen years of service under the Greater New York Pension Fund and two years of service under the Southern Pension Fund, will receive a pension from the Southern Pension Fund equal to two-fifteenths of the benefit for fifteen years of service.

Similarly, the Southern Welfare Fund has assumed the obligation to provide welfare coverage to these same participants.

*RESPONSE TO INTERROGATORY NO. 15:*

Plaintiffs are unable to discern from the phrasing of this interrogatory the nature of the information that the defendants seek. Therefore, plaintiffs reserve their response hereto until the defendants provide sufficient clarification.

*RESPONSE TO INTERROGATORY NO. 16:*

a. & c. Each plaintiff employee has lost the benefit of those contributions that were made to the Greater New York Funds on his/her behalf. Although the Southern Pension Fund has assumed the unvested liabilities cre-

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ated by such contributions, and the Southern Welfare Fund has relieved the Greater New York Welfare Fund of its obligation to supply welfare coverage to these plaintiff employees, neither Southern Fund has received the corresponding assets. Therefore, these contributions that were made on behalf of the plaintiff employees are being used for the sole and exclusive benefit of others. Moreover, the Southern Funds are without the use of these funds by which they otherwise would have produced the income necessary to satisfy their liabilities at current benefit levels as they vest or become payable. Consequently, to the detriment of the plaintiff employees, the Southern Funds are not as fiscally sound as they otherwise would have been.

b. Plaintiffs do not possess any documents establishing the Greater New York Funds' refusal to transfer these assets. There is no dispute that contributions were made to the Greater New York Funds on behalf of plaintiff employees or that the Greater New York Funds have refused to transfer to the Southern Funds that portion of their assets which is attributable to these contributions.

d. The exact amount of this loss will not be determinable until the Greater New York Funds supply plaintiffs with the requested accounting.

*RESPONSE TO INTERROGATORY NO. 17:*

Plaintiffs are unable to discern from the phrasing of this interrogatory the nature of the information that defendants seek. Therefore, plaintiffs reserve their response hereto until the defendants provide sufficient clarification.

*RESPONSE TO INTERROGATORY NO. 18:*

a. & c. Under the applicable collective bargaining agreements, plan documents and controlling provisions of law, the plaintiff employees are entitled to receive a pension if they attain ten years of credited service. They are also entitled to accrue increased pension benefits for service

beyond ten years. Finally, these employees are entitled to receive welfare coverage during all periods of service. By failing to transfer that portion of its reserves which are attributable to contributions made on behalf of the plaintiff employees, the Greater New York Funds have impaired the fiscal stability of the Southern Funds, which has assumed the obligation to provide these benefits to the plaintiff employees. In turn, the Greater New York Funds have frustrated the ability of the plaintiff employees to obtain a pension, achieve additional years of pension credits and/or receive welfare coverage throughout their period of service.

b. Plaintiffs do not possess any documents establishing the Greater New York Funds' refusal to transfer these assets. There is no dispute that contributions were made to the Greater New York Funds on behalf of plaintiff employees or that the Greater New York Funds have refused to transfer to the Southern Funds that portion of their assets which is attributable to these contributions.

*RESPONSE TO INTERROGATORY NO. 19:*

a., c. & d. The defendants have harmed the plaintiff employees and the other participants of the Southern Funds by allowing the Greater New York Funds to retain those monies contributed on behalf of these employees. As a result, these assets are not being used to provide benefits to the employees on whose behalf they were contributed. Instead they are being used for the sole and exclusive benefit of others.

Defendants have exacerbated the situation by failing to adopt asset-transfer rules as required by 29 U.S.C. § 1414.

Finally the defendants have favored those individuals who continue to participate in the Greater New York Funds to the detriment of those participants who are now participants in the Southern Funds. Contributions

that have been made for the sole and exclusive benefit of these latter participants are now being used to produce benefits for the remaining participants in the Greater New York Funds.

b. & e. Plaintiffs do not possess any documents establishing these acts or omissions of defendants. There is no dispute that defendants have refused to transfer such assets to the Southern Funds, have failed to adopt asset-transfer rules and are not employing these assets for the sole and exclusive benefit of the participants on whose behalf they were contributed.

### VERIFICATION

STATE OF NEW YORK     )  
                                  ) ss. :  
COUNTY OF NEW YORK    )

Ernest Dicker, being duly sworn, deposes and says that he is a plaintiff in this action, and that he is informed and believes, based on investigations made by the plaintiffs' attorneys, as well as information supplied to him by the other plaintiffs, that the foregoing Responses of Plaintiffs to Defendants' First Set of Interrogatories are true and correct.

/s/ Ernest Dicker  
ERNEST DICKER

(Notarization Omitted in Printing)

## Exhibit 3

Deposition of plaintiff Desdemona Jones Caruso,  
conducted on March 18, 1987 (p. 3, 8-10, 21)

[3]

March 18, 1987

12:15 p.m.

Deposition of DESDEMONA JONES CARUSO, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] A. Yes.

Q. You should also understand that your testimony today is somewhat circumscribed and that you may be required to testify again?

A. Yes.

Q. Would you please identify yourself, name, address?

A. Desdemona Jones Caruso, 6 Beckwith Circle, Utica, New York.

Q. And your business is?

A. Owner-operator of several nursing homes.

Q. Would you name them, please?

A. Markview Nursing Home, Massapequa, Long Island; Fieldston Lodge, Riverdale, New York; Greenwich Laurelton, Greenwich, Connecticut; Fiddlers Green, Springville New York; Betsy Ross, Rome, New York.

Q. Ms. Caruso, you are, are you not, a plaintiff in the lawsuit in connection with which this deposition is being taken?

A. Yes.

Q. Ms. Caruso, you are a plaintiff in this action in your role as an employer, contributing to the Southern Funds?

[9] A. Yes.

Q. The pension and welfare funds?

A. Yes.

Q. You are not now a trustee of those funds, are you?

A. No. I am not.

Q. Had you been at any point?

A. Never.

MR. REILLY: Just—I know you did this in Mr. Demisay's deposition.

So each record is clear, by the "Southern Funds," we are referring to the Southern New York Residential Health Care Facilities Association Pension Fund and the Southern New York Residential Health Care Facilities Association Welfare Fund.

MR. ROSE: I agree with that.

Q. There was a time, was there not, Ms. Caruso, when you were a contributing employer to the defendant, Greater New York Fund? And by that, I mean the Local 144 Nursing Home Pension Fund, ~~and the New York Nursing Home—Local 144 Welfare Fund?~~

A. Yes.

Q. Would you please tell us when you became [10] a contributing employer to the Greater New York Funds?

A. Sometime in 1968. I don't know the exact month.

Q. Did you remain a contributing employer continuously from that time until your withdrawal, together with the other employers that are now contributing to the Southern Funds?

A. Yes.

Q. At some point during that period, were you made aware of the terms of the Greater New York Funds—of their provisions?

A. Not specifically that I can recall right now.

Q. Did you ever receive a copy of the pension trust agreement of the Greater New York Fund?

A. I am sure that I did.

Q. Similarly the trust agreement for the Greater New York welfare fund?

A. Yes.

Q. Did you understand that you were a party to that agreement?

A. Yes.

\* \* \* \*

[21] A. I said that I never thought of it relative to its legality or not. I really don't know whether it is legal or not.

Q. Turning again, and calling your attention to paragraph 45 of the complaint, can you explain how other plaintiffs are deprived?

A. Other than myself?

Q. Yes.

A. I have no idea.

Q. Are you aware of any participant not receiving a benefit that that participant was entitled to?

A. No.

Q. Either from the Southern Fund or from the Greater New York Funds?

A. No.

Q. Are you aware of the decision-making process in the Southern Funds, how the trustees make decisions?

A. No.

Q.- Have you read the trust instrument to which you are now obligated or a party to?

A. I might have. I don't recall reading it.

\* \* \* \*



## Exhibit 4

Deposition of plaintiff Jack Friedman,  
conducted on March 18, 1987  
(p. 3, 8-9, 13, 27-29, 32-35, 38-43, 51-52)

[3]

March 18, 1987  
3:35 p.m.

Deposition of JACK FRIEDMAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] Q. You should also understand that you are giving this testimony under the equivalent of oath and that the testimony that you give today may be introduced in evidence at a trial or may be used in connection with motions that may be filed in this case.

Is that clear to you?

A. Yes, sir.

Q. You should also understand that your testimony today is somewhat circumscribed, though I would not necessarily agree with Mr. Reilly's statement of that, it certainly is circumscribed and that you, indeed, may be required to testify again.

Do you understand that?

A. Yes, sir.

Q. Mr. Friedman, would you more fully identify yourself, your address, your home and business address?

A. My name is Jack Friedman. My home address is 129 Audley Street, A-U-D-L-E-Y, Queens, New York 11418. I am the administrator of Fort Tryon Nursing Home at 801 west 190th Street, New York City, New York, 10040.

Q. Mr. Friedman, you are a plaintiff in [9] this lawsuit, are you not?

A. Yes, sir.

Q. Indeed, you are a plaintiff in two different capacities?

A. Yes, sir.

Q. As a trustee of the Southern Funds?

A. Yes, sir.

Q. And as the proprietor of Fort Tryon Nursing Home?

A. Yes, sir.

Q. Are you also the proprietor of Franklin?

A. Yes.

Q. And Friedwald?

A. Friedwald House.

Q. You were at one point a contributing employer to the Greater New York Funds, were you not?

A. Yes, sir.

Q. When did you withdraw from those funds?

A. Approximately sometime in 1985.

\* \* \*

[13] Q. Around that time you withdrew both from the Greater New York Pension and Welfare Funds?

A. Correct.

Q. How long were you a contributing employer to the Greater New York Funds?

A. Approximately 15 years.

Q. During any of that period, were you a trustee of any of their funds?

A. I don't believe so, no.

Q. You don't believe so? You wouldn't remember?

A. I don't want to say anything 100 percent, but I was never at a meeting or anything like that.

Q. Did you have any—do you understand what a fiduciary is of a plan? Is that a term that you have some familiarity with?

A. Fiduciary means a responsibility.

Q. That's part of it, certainly?

MR. REILLY: This is not in the form of an objection, but a point of clarification.

\* \* \*

[27] Q. To the best of your recollection, Mr. Friedman, has the board of trustees of the Southern Funds ratified, since the commencement of this action, the bringing of this lawsuit on its behalf?

MR. REILLY: When you say "on its behalf," I want to make it clear that this lawsuit, the Southern Funds are not named plaintiffs in this lawsuit.

MR. ROSE: That's correct.

Q. But you presumably, as a trustee, are bringing it on behalf of the fund, is that correct?

A. Correct.

Q. My question is: Has the board of trustees, to this very day, ratified the bringing of this lawsuit on its behalf?

A. I don't recall them ratifying it, the action.

Q. Has it even been discussed at a board of trustees meeting?

A. Is this the same question we discussed earlier?

Q. I don't think so?

[28] A. Then I am very confused now.

MR. REILLY: Your question was—you said has it ever been discussed?

Q. Has the bringing of this lawsuit on its behalf ever been discussed, on behalf of the Southern Funds, ever been discussed since the commencement of the lawsuit by the board of trustees of the Southern Funds?

A. I don't understand the question because it seems to me I answered the question earlier, which I don't mind answering twice, but I don't want to trip myself up.

Q. I don't want you to. I just want information.

A. May I paraphrase the question and if I am wrong please tell me.

Are you asking me has the action that we are referring to here been approved by the board of trustees or was it discussed by the board of trustees.

Q. Either, yes.

A. It has not been approved, to the best of my knowledge. And there was discussion on it.

However, are we talking about the [29] original which you said may have been filed before—

Q. I am talking about since the commencement of this action.

A. Yes. And assuming the commencement of the action was in January '85 for discussion of '85.

Q. I think it was June?

A. O.K. Has this been discussed at a board meeting? I believe so.

Q. Can you, to the best of your recollection, tell me when?

A. No. Not recently, not in the past six months, I don't believe.

Q. Taking off your trustee hat and going back to your Southern employer hat now, there was a point, at or about the withdrawal from the Greater New York Funds, that you and your colleague Southern employers discussed, did you not, what you would do about a pension plan and a welfare plan?

A. Yes.

\* \* \* \*

[32] A. Was I aware of the fact sometime before the contract was signed that there were different kinds of pension plans that we could have gone into or no pension plan, and we had the opportunity of going into different kinds of welfare plans, dental plans or not going into any of them whatsoever?

Q. Yes.

MR. REILLY: I don't think Mr. Rose's question was—

MR. ROSE: I will buy that variation of the question.

MR. REILLY: I object to it as stated that it assumes as fact they had all these options.

Your original question was, did they have such options.

MR. ROSE: I am asking if he was aware they did.

A. Do they have the option of having a welfare fund to pay for all kinds of surgery or [33] partial surgery, is that what you are saying?

Q. That's certainly part of it.

A. Yes.

Q. You were aware that you had a number of options on both pension and welfare sides?

A. On a technical basis, yes. Only in—practical basis, maybe no.

Q. Practical basis meaning, again, the union?

A. Right.

Q. We put that aside?

A. Or the union or our desire to do something for the employees. On a technical basis, yes. On a practical basis it would go in one ear and out the other.

Q. I appreciate your answer, thank you.

So when you did discuss the pension and welfare plan issues with the representatives of the union, you agreed to—what you did agree to, and what the record shows you agreed to as a matter of bargaining with the union, is that correct, what you agreed to in the collective bargaining agreement is what I am referring to now?

MR. REILLY: Can we identify for the [34] record, there is a provision or something in the collective bargaining agreement, are you talking about the section on Southern Funds? The collective bargaining is a lengthy document with many, many provisions.

MR. ROSE: I am referring to provisions relating to the pension fund and welfare plan provisions in that collective bargaining agreement.

THE WITNESS: The question again is—would you just repeat the question, please.

MR. ROSE: Would you read it back, please.

(Record read)

MR. ROSE: I think having heard that, I am going to restate it.

THE WITNESS: Please.

Q. I think what I am asking is rather obvious, and that is that the collective bargaining agreement that you entered into is the result of your bargaining with the union with regard to what it provides as to a pension plan and a welfare plan?

A. Correct.

Q. If the bargaining powers were different [35] or at a different time, it might have come out a little bit different?

A. Anything is possible.

Q. In the course of the discussions with regard to the pension plan, one of the issues was, was it not, whether or not to give past service credit to the employees of the Southern employers in any pension plan that was to be established for them?

A. May I ask you to repeat the question and try to give me some examples or numbers that we are talking about? In other words, may I paraphrase the question?

Are you saying did we discuss the issue of an employee who was with the Greater New York Funds for eight years and then coming over to us for two years?

Q. Yes.

A. What our obligation would be, if any?

Q. My question is whether you discussed whether or not to give credit, in your example for those eight years?

A. I don't recall the actual discussion, but I know we are, in effect, I believe, doing it.

\* \* \* \*

[38] Q. I am not sure you have a choice.

A. I don't know. My answer is I don't know. Having been given the full opportunity to read this, I cannot comprehend it.

Q. Do you remember being at this meeting?

A. Offhand no. If it says I was there, I assume I was there.

Q. I call your attention to page 1 of the minutes of the November 5, 1985 trustees meeting of the Southern



Funds, and ask you whether your name appears as among those present?

A. Yes, present.

Q. Do you have any reason to believe that this is inaccurate?

A. No.

Q. You have recollection of discussing the giving of past service credit to the employees at any meeting, apart from this one?

A. I have a recollection, but I have no [39] close details of it.

Q. Insofar as you have a recollection of such discussion of such a trustees' meeting, do you recall that you had a choice, that this was one—this was not the only choice you had?

A. I don't recall.

Q. Wasn't this element one of the most expensive—strike "most expensive"—a very expensive feature in the plan?

MR. REILLY: Objection. That question doesn't go to the issue of standing and the characterization of "very expensive" is ambiguous.

MR. ROSE: Expensive in comparison to other elements of the plan.

MR. REILLY: Whether it was more or less expensive than certain elements of the plan does not go to the question whether this plaintiff has standing to bring this lawsuit.

The comparison of costs of the various items is not relevant to that issue.

Q. Whatever choice was made by the board of trustees, Mr. Friedman, it was their choice, was it not?

[40] A. I would have to assume so.

Q. Let me call your attention to paragraph 45 of the third amended complaint, where it alleges plaintiffs have been deprived of a transfer of the portion of the Greater Funds corpuses. And there is more.

Plaintiffs includes you. It includes you in two different capacities, so you are alleging that you have been

deprived of a transfer of a portion of the Greater New York corpuses.

Would you explain to me how you have been deprived in each of the two capacities that you are a plaintiff here?

A. As an employer, the way I see the question—I just want to rephrase the question, and you will tell me if I am right or wrong in my question.

I said I am being deprived because we don't have the transfer of certain assets.

Q. Who is "we"?

A. You said I am wearing two hats, correct?

Q. But you said "we."

A. I am wearing two hats as employer and trustee.

[41] Q. The "we" is both you.

Go ahead.

A. I am saying that I am being harmed, if we don't get the money from the funds—

Q. May I interrupt you. The language. Perhaps you could take a look at it, the language I am focusing on are the fourth and fifth lines, "plaintiffs have been deprived of a transfer."

Now if I understand the claims here, you as an employer are not making any claim that you are entitled to a transfer personally of the money, is that correct?

A. Excuse me—

MR. REILLY: When you say "transfer," what are you talking about?

MR. ROSE: Transfer of the portion of the Greater funds corpuses.

A. As an employer it hurts me or what have you. The reason for that—

Q. What hurts you?

A. The lack of the funds of the—the lack of the Southern New York Funds receiving certain monies from the Greater New York Funds.

Q. That's not what I am focusing on.

[42] It says you, plaintiffs, that includes you, have been deprived of a transfer. You as an employer.

How have you been deprived of a transfer to you?

MR. REILLY: Objection. It doesn't say a transfer to the employer.

The witness began his answer, I think he should be allowed to continue.

It says deprived of a transfer. It doesn't say a transfer to where. Let's not misstate.

MR. ROSE: "Plaintiffs have been deprived of a transfer of the portion of the Greater Funds corpus" and attributable to"—that doesn't add anything.

Q. Explain how you are deprived, in your own words, of that transfer?

A. If we don't have the transfer, we will not be able to pay our employees certain benefits.

Q. If you don't have a transfer from who to who?

A. As I said earlier, if we don't have a transfer from the Greater New York Funds to the [43] Southern New York Funds, our employees will not be able to be covered in the future for many benefits. Our welfare costs are more than the income or rather, more than is being charged to the employers, and it will be impossible to keep our level of benefits or rather, our level of benefits will have to be reduced because we don't have the funds to pay for it.

Therefore, if we had the transfer of funds from Greater to Southern, we would probably be able to afford these present benefits because of interest income, or what have you.

Q. Now, am I correct that that was your response to how you as an employer are deprived, is that your answer?

A. Correct.

Q. Now how are you deprived as a trustee?

A. As a trustee also, you want to see that the employees receive decent benefits. If there is insufficient income to pay for the benefits—

Q. As a trustee, Mr. Friedman, how could you prudently set up a benefit level which you can't afford?

\* \* \* \*

[51] A. I don't recall.

Q. Was it one of your employees?

A. I don't recall.

Q. Was it for benefits to be provided by your plans or the Greater New York plans?

A. I don't recall.

Q. Mr. Friedman, when the board of trustees had the issue of benefit levels under the Southern pension plan before it, did it have an actuarial report?

A. You are referring to the pension plan?

Q. I am.

A. I believe so.

Q. Did the actuary offer you more than one choice?

A. One choice referring to one carrier or one—

Q. Level of benefits, arrangement, different level plan, different kinds of plan?

A. I know there is an awful lot of discussion with the type of—not the type of company, not the company—at one time there was a question of defined benefit or defined contribution. That goes back a while ago.

[52] Q. So there were some choices, at least the last one you mentioned, is that correct?

A. Correct.

Q. Might there have been other choices?

A. There was a lot of talk that I could tell you. I don't recall the talk.

Q. Do you remember the actuarial report?

A. No.

Q. Or study.

Do you remember receiving any report?

A. We received a lot of reports.

Q. More than one page?

A. I believe so, yes.

Q. As a trustee of the Southern Funds, are you familiar with, in a general way, how the records are kept?

MR. REILLY: Objection. How the records of the Southern Funds are kept is not relevant to this witness' standing in the lawsuit.

MR. ROSE: Unless your counsel directs you not to answer—

MR. REILLY: Witness is directed not to answer the question.

\* \* \* \*

**Exhibit 5**

**Deposition of plaintiff Abraham C. Grossman,  
conducted on March 18, 1987  
(p. 3, 9-10, 12-14, 17-18, 27-28)**

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[3]

March 18, 1987

2:00 p.m.

Deposition of ABRAHAM C. GROSSMAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[9] Q. Would you identify yourself, name, address, business and its address?

A. Abraham C. Grossman. Home address is 1569 49th Street, Brooklyn, New York. Business address is Bruckner Nursing Home, 1010 Underhill Avenue, Bronx, New York.

Q. Mr. Grossman, you are, are you not, a contributing employer to the—what we are going to be calling the Southern Funds? And by that, we mean the the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund?

A. That's correct.

Q. Besides being a contributing employer to the other funds, you are a trustee, are you not?

A. Yes, I am.

Q. Have you been a trustee of the Southern Funds since creation of those funds?

A. Yes, I have been.



Q. And when was that?

A. Actually the beginning of operation was December of 1985.

Q. Prior thereto, you were a contributing [10] employer to the Greater New York Funds?

A. Yes.

Q. Pension and welfare funds?

A. Yes.

Q. And would you tell us, please, for what period of time were you a contributing employer to the Greater New York Funds?

A. For various facilities statrting in 1986, August of 1986.

Q. And continuously through—your withdrawal?

A. Continuously with one or more facilities until we stopped contributing to the Greater New York plan and contributed to the Southern New York.

Q. Were you ever a trustee of the Greater New York Funds?

A. Never.

Q. Neither of them?

A. Never.

Q. Do you have any information as to any contributing employers to the Greater New York Funds who have withdrawn from those funds other than the Southern employers?

A. I am not aware of any.

\* \* \* \*

[12] Q. Have you read them?

A. At one point, yes.

Q. In fact, didn't you participate in adopting them?

A. Yes, I did.

Q. You did sign them?

A. I did sign them.

Q. Are you familiar with the procedure specified in those trust agreements as to how decisions of the boards of trustees are to be made?

A. In general terms, yes.

Q. Would you tell us your understanding?

A. My understanding is that there is to be a vote; that each side, management side and union side, constitute one vote. If there is an impasse, it goes to arbitration.

Q. The Southern Funds are not party plaintiffs in this lawsuit, are they?

A. No, they are not.

Q. Was the question as to whether they should be ever discussed by the trustees?

A. Yes, it was. And a—

Q. Did they ever vote—informally, did they decide?

[13] A. I believe it did not come to a vote, but it was stated by the union trustees that they would not become plaintiffs because they are the defendants, because they are the trustees in the Greater Fund. Therefore, they would not participate, but they had no objection to the employee trustees bringing the lawsuit.

Q. Employers, you mean?

A. Employers—on behalf of the employees.

Q. On behalf of the employees?

A. On behalf of the employees, money which is there for their benefit.

Q. Do you mean on behalf of the employees or on behalf of the plan?

A. On behalf of the plan which benefits the employees.

Q. It is true, is it not, Mr. Grossman, that the board of trustees of the Southern Funds has not authorized the plan to be a party plaintiff in this lawsuit?

A. That's correct.

Q. Since what you described is essentially a disagreement among the trustees, why was not the arbitration procedure used?

[14] MR. REILLY: I object to your characterization of what he said as a disagreement between the trustees.

MR. ROSE: If he can answer, that's fine. If he needs it rephrased—

MR. REILLY: The question is improper in the sense that it characterizes the witness' testimony.

Q. Let me ask you, did I characterize it erroneously?

A. I don't think it ever came to an official vote where there was a deadlock on the vote.

There was discussion about it and it was—since the union trustees said they were in an impossible situation to being both the defendants and the plaintiffs, and that the management trustees on their own should bring the lawsuit as trustees of these Southern Funds.

Q. You're not suggesting, are you, that the union trustees wanted you to bring the lawsuit at all, are you?

A. They said they would not have any objection if we did.

\* \* \* \*

[17] Q. So there has been some discussion?

A. There has been some discussion probably throughout the entire period at one time or another.

Q. In the the course of discussions regarding the pension plan, the Southern pension plan, was one of the questions to be resolved as to whether or not credit would be given for service of participants while they were participants in the Greater New York Fund?

MR. REILLY: What time are we talking about, Mr. Rose?

MR. ROSE: When they had these discussions, my question is whether they discussed this issue.

A. That the credits of the previous employment, while they were covered under the Greater that they were included, yes, there were discussions.

Q. What was the nature of the discussions?

A. During the negotiation period, there was a discussion of the union concerns if we establish new funds that it would not be starting as day one, if somebody was an employee for any length or period [18] of time, that that would be counted at least towards their retirement benefits.

Q. You mean they asked for it and you agreed with it without any further discussion, is that what you are suggesting?

A. There was discussion.

Q. What were the—were there any alternatives suggested or discussed?

A. There may have been. I don't recall any specific alternatives.

Q. You were aware then that you had a choice as to whether or not to give past service credit or not to those participants, is that correct?

A. Yes.

Q. You ultimately decided, you and your colleagues, your attorney, employers and ultimately the trustees, your fellow trustees agreed to give that credit? And the minutes of your meetings show that, is that correct?

A. Correct.

Q. Have you had an opportunity to look at the plaintiffs' response to defendants' first set of interrogatories?

A. No.

. . . .

[27] My question to you: How have you been deprived?

MR. REILLY: Before the witness answers the question, you are using the word "you," and I think the word "you" needs to be clarified for the witness because it is unfair to me because this witness is wearing, for a lack of better term of art, wearing more than one hat.

Q. I would like for you to answer for both.

A. As a trustee, that I just gave is a valid one.

As trustee of the Southern Funds, I have an obligation to see that the funds have enough funds available in order to provide the benefits that we are obligated to provide to the employees.

As far as an employer, as a contributor to the funds, if funds are not—let me go back. As a contributing employer, if the funds do not have a financial base in order to be able to provide the benefits that are called for under the contract, the end result would be that, as an employer, I would be asked to contribute more. So, therefore, I have injury.

[28] It is pretty much the same as the trustee; if there is not enough funds available, the base isn't big enough,

it is not as solid and sound financially. It becomes a responsibility or a difficulty to provide those benefits that are called for.

By not transferring the funds that have already been contributed for the employees from the old fund to the now fund, injures me in both positions.

Q. When the Southern pension fund was created and you set the benefit level, was that benefit level set on the condition that money be transferred from the Greater New York Fund, New York pension fund?

A. I don't know whether the word "condition" is correct. That may be too strong a word.

\* \* \* \*

**Exhibit 6**

**Deposition of plaintiff Nicholas D. Demisay,  
conducted on March 18, 1987  
(p. 3, 8-10, 14, 16-21, 25-27, 31-34, 45-46)**

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[3]

March 18, 1987

11:00 a.m.

Deposition of NICHOLAS D. DEMISAY, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public, within and for the State of New York.

\* \* \*

[8] Q. Mr. Reilly has put in the record at the outset what he sees as the scope of the deposition.

You understand that your testimony may be somewhat limited thereby, that is not by virtue of his statement but by virtue of the court, and you may be required to testify again if the court permits further discovery?

A. Yes, sir, I understand that.

Q. For the record, would you please identify yourself fully, your name?

A. Nicholas Demisay.

Q. And your address?

A. 300 East 54th Street, New York City, Apartment 32-D, 10022.

Q. And your business is?

A. I am the administrator and operator of Clove Lakes Nursing Home, 25 Fanning Street, Staten Island New York 10314. I am also a trustee of the Southern New York funds for the management.



Q. And Mr. Demisay, you are a plaintiff in the action which is the subject of this deposition?

A. Yes, that is correct.

[9] Q. You are a plaintiff in two respects, is that correct?

A. Yes, sir.

Q. One as trustee and one as—and also individually as the proprietor of Clove Lakes Nursing Home?

A. Yes, sir, that's correct.

Q. You are aware, Mr. Demisay, that you as a plaintiff have made certain allegations in the third amended complaint filed in this lawsuit?

A. Yes, sir.

Q. You have acknowledged that you are a trustee of the Southern Funds?

A. Yes, sir.

Q. Were you a contributing employer to the Greater New York Pension and Welfare Funds at one time?

A. Yes, sir.

Q. Would you tell us the period of time that you were such a contributing employer?

A. My former partner and I opened up Clove Lakes Nursing Home in September of 1967. I am not sure whether it was when we opened, but I can safely say we started making contributions as of January 1, [10] 1968.

Q. You continued—

A. Excuse me.

At that time, it was known as Metropolitan New York Nursing Home Association; with 144 it became the Greater New York. We have been making contributions to the 144 Pension Fund since 1968.

Q. Was Metropolitan a predecessor to Clove Lakes?

A. No, Metropolitan was the former name of what is now known as the Greater New York. It was the Metropolitan Nursing Home Association at the time. Same group, just changed their name at a later date.

Q. I see.

You were a contributing employer to the Greater New York Funds, both the pension and welfare funds, continuously.

MR. REILLY: Just so the record is clear, I think we have identified the Greater New York Funds in the papers as a defined term.

\* \* \* \*

[14] Q. Let me see if I am understanding you.

The whole liability for a given participant benefit is payable by the Southern Funds subject to an offset of any benefits that are received from the Greater New York Funds, is that correct?

A. That's correct.

Q. You said that there is—I think you referred to it as an understanding—it is more than an understanding, isn't it. Isn't it a matter of contract?

Don't you have a collective bargaining contract that obligates you to pay those benefits as you described them?

A. Yes, sir.

Q. Indeed, you have a pension trust instrument to which you are a part, which obligates you to make those same payments?

A. Yes, sir.

Q. What is the decision-making process for the Southern Funds?

\* \* \* \*

[16] A. The management, four representatives of management and four representatives of Local 144.

Q. Who makes final decisions?

A. The group makes the final decisions.

Q. The group being the management?

A. The trustees from management and the trustees from labor.

Q. In other words, the board of trustees makes the decisions?

A. Yes, sir.

Q. Has the board of trustees of the Southern Funds discussed the question as to whether it should be a plaintiff in this case?

A. Yes.

Q. Is it so that the board of trustees has declined to vote to do so?

A. It is my understanding that when the discussion came up, we had an agreement that Local 144, as represented by the labor, our trustees from labor, would not oppose litigation brought, but they would not become part of the litigation itself or take any part, one way or the other.

MR. ROSE. I ask that the question be reread.

[17] And I ask you to respond to the question.

A. I thought I did.

MR. REILLY: I think the witness responded in the way he felt appropriate.

MR. ROSE: I don't think the answer is responsive.

MR. REILLY: That's a matter of interpretation.

MR. ROSE: I don't think it is.

(Record read)

A. Never came to a vote. We had an understanding prior to establishing the funds with Local 144 that they would not oppose any litigation brought about by management. But it never really came to a vote, to my recollection.

Q. Was it proposed?

A. No, sir.

Q. Then why was it discussed?

A. It was discussed because there was concern regarding the fiscal viability of the current welfare funds.

Q. You say it was never proposed by any member of the board of trustees that—or suggested [18] at a meeting of the board of trustees that the Southern Funds be a plaintiff in this case?

A. No. My recollection is that when these discussions came up regarding the fiscal viability of the welfare fund,

which is extremely expensive, there was some discussion concerning the so-called carve-out litigation.

It never came to a vote. There was no vote on it because there was an understanding that the Local 144 management—

Q. My question was: Was it ever proposed or suggested?

A. The best of my recollection, at one of the trustee meetings when this discussion came up, I don't know which one of the trustees from labor suggested that we pursue our litigation promptly in order to get some of this money transferred over to the Southern New York Funds. I don't remember who it was.

But it never came to a vote. It was never an issue. It was an understanding that we had right from the onset that they would not oppose a carve-out litigation.

Q. Mr. Demisay, is it so that the board of [19] trustees have never voted to be a plaintiff in this action?

A. That's correct.

Q. However, you are bringing this action as a trustee of the Southern Funds?

A. As the management trustee.

Q. As a trustee of the Southern Funds?

A. Representing management; yes, sir.

Q. Doesn't your trust agreement for the Southern Funds provide that decisions on behalf of the funds be made by the board of trustees?

A. Yes, sir.

Q. And in the event of a dispute, is there not an established procedure for resolving that dispute?

A. Yes, sir.

Q. So is it fair to say that you are not authorized to bring an action on behalf of the Southern Funds?

A. No, sir.

Q. Where did you receive the authorization?

A. In our discussions in negotiations with Local 144, when we were setting up separate pension and welfare funds, there was a clear understanding—[20] and I am not sure it is not in writing, I think it is in writing some-

place—that they would not oppose our pursuing litigation on getting our corpus out of the Greater New York Funds.

Q. Yes, that is correct.

You equate the not opposing with authorization to bring the lawsuit?

A. Yes, sir.

Q. Have you been so advised that that is the same?

O. I was advised by our counsel, yes.

MR. REILLY: Objection.

What do you mean by “so advised”?

MR. ROSE: Has he been so advised.

MR. REILLY: If you are referring to consultation with counsel, then I object.

MR. ROSE: All objections are reserved.

Are you directing him not to answer?

MR. REILLY: To the extent that the question calls for the witness to go into consultations between himself and his counsel, I direct the witness not to answer the question.

Q. We have established, have we not, that [21] the board of trustees did not authorize the bringing of this lawsuit, they did not vote to authorize the bringing of this lawsuit?

A. They did not vote, that’s correct. There was no vote.

Q. Has the board of trustees of the Southern Funds, at any time since its commencement, ratified the bringing of this lawsuit?

A. You mean the trustees of management—

Q. Have they taken action at a meeting which is recorded in minutes?

A. No, sir. Not to my knowledge.

Q. You and the other Southern employers who are contributing employers to the Southern Funds agreed to establish the Southern Funds, did you not?

A. Yes, sir.

Q. You knew that you were not legally obligated to do so, is that correct?

MR. REILLY: Objection. If you are asking the witness to draw a legal conclusion, that's going beyond the scope of this witness. You can ask the witness factual questions.

[25] MR. REILLY: By "particular terms." you are referring to the terms of the trust agreements?

MR. ROSE: Yes, I am.

A. Did we discuss them? Yes.

Q. And the same terms were discussed, were they not, at a board of trustees meeting of the Southern Funds?

A. No, sir.

Q. All eight of the trustees signed those instruments, did they not?

A. Yes, sir.

Q. They didn't discuss hem (sic)?

A. They discussed them before it actually became an accomplished fact that we were now a pension and welfare fund known as Southern New York.

There was a great deal of negotiation and discussion prior to that time. When we agreed to it, we signed it and there was no further discussion after we signed it.

Q. In your discussions among yourselves, among the Southern employers and with your negotiations on the subject with the union, did you not discuss the issue of giving past service credit [26] to the participants for their service under the Greater New York Funds?

MR. REILLY: With whom—I am lost. It was a very long question. With whom are these discussions being had?

MR. ROSE: Read the question back.

(Record read)

MR. REILLY: Just so I understand, we are talking about discussions with Southern employers and, number two, discussions in the form of negotiations with Local 144? It is a two-part question.

MR. ROSE: That's right.



A. The answer to both parts is yes, there were discussions.

Q. So that was a question which could have been resolved in more than one way.

If it was negotiated, it could have been different than it came out?

A. What could have been different?

You asked if we had negotiations and discussions. Yes.

Q. My question was, the result of giving past service credit as you have, could have been [27] different had the negotiations or your willingness to give on that issue been different?

A. Sure.

Q. It is possible, for example, that you might have not given past service credit at all, or you might have given partial past service credit, is that correct?

A. If Local 144 had agreed to it, sure.

Q. Mr. Demisay, is it fair to say that there is a similarity between the terms of the Southern Funds, the trust instrument and the trust instrument of the Greater New York?

A. Is it fair to say that there is a similarity?

Q. Yes.

A. Yes.

Q. In fact, aren't they very, very similar, almost identical?

A. They are not identical. They are similar.

Q. Can you mention the differences that come to mind?

A. Offhand no; I would have to review the whole thing.

\* \* \* \*

[31] Q. Are you deprived?

A. As an individual?

Q. As an individual management trustee, are you deprived, as alleged in that paragraph?

A. It is my understanding that my fiduciary obligation as a trustee is to make certain that those pension and welfare funds are fiscally viable and remain so and if,

for any reason, they are not, I could be held personally liable.

Q. And in your capacity as a distributing employer, are you deprived?

A. Yes.

Q. How?

A. Well, if those funds are not fiscally viable—

Q. I am not sure what that means.

Would you explain?

A. The welfare funds at the present time are running cash flow short. There is not enough money in it. If something isn't done fairly soon, the only way it is going to remain viable is that we'll have to increase our contributions to the [32] welfare part. That affects me as an employer.

Q. Yes, it certainly does.

Are you aware that as a trustee you are to—you are obligated to make your decisions solely in the interest of participants?

A. Yes, sir.

Q. And not employers?

A. Yes, sir.

Q. However, this decision seems to be primarily in the interest of employers, does it not?

A. No, sir. You asked me a question of how does it affect me as an employer and how it affects me as a trustee.

Q. The effect was that you might have to make additional contributions?

A. That's one of them.

The other thing, as a trustee, we can reduce the benefits to the employees; that would have to be negotiated with

144. Q. How are the participants deprived?

A. The employees?

The plaintiffs, the plaintiff employees in this action?

A. They can be certainly deprived if we [33] have to reduce the benefits in negotiations.

Q. Mr. Demisay, let me remind you, the allegation is that plaintiffs have been deprived.

Would you kindly explain to me how they have been deprived?

A. They have been deprived of some assurance that monies that have been contributed on their behalf to the Greater New York Fund are no longer in the control of the Southern New York. They are not there. That money is over there in the Greater New York Fund.

We have no control over that. We have nothing. Yet, we the employers have been contributing to those funds, Clove Lakes in particular, since 1968.

Now, the use of those funds or the funds in the Southern New York properly invested accrues to the employees. Those funds do not belong to the employer. They belong to the employees. We, as trustees, simply have the management of those funds. They don't belong to the trustees. They don't belong to the employers.

Q. Mr. Demisay, I am going to try the question once more.

[34] The allegation is that plaintiffs have been deprived.

A. Yes, sir.

Q. I want you to explain to me how they have been already deprived as of this date?

A. I just explained that to you, to the best of my ability, sir.

Q. You were talking about the future, as I understand.

A. No, we are talking about the present viability of those funds.

Q. Have the benefits not been paid to any participant?

A. No, sir, they have all been paid.

Q. They have all been paid?

A. Yes, sir.

Q. That's both on the pension side and on the welfare side?

A. Yes, sir.

. . . .

[45] MR. REILLY: Objection. This again goes beyond the scope of standing what the provisions of the Southern New York plan are.

MR. ROSE: Are you directing him not to answer?

MR. REILLY: Unless I am given an explanation as to how this goes to standing, I will direct the witness not to answer.

MR. ROSE: Are you directing him not to answer?

MR. REILLY: I take that as a "no" to my question.

I direct the witness not to answer in that the question goes beyond the question of standing.

MR. REILLY: Off the record.

(Recess taken)

Q. Mr. Demisay, do you claim any portion of the assets of the Greater New York Funds for yourself personally as an employer or as a trustee of the Southern Funds?

A. Personally?

Q. Yes.

A. Personally, no, but as a representative [46] of the management trustee, yes. We do claim a portion of the funds that were contributed to Greater New York belonging to Southern New York.

Q. Your claim is a representative claim; you have no personal claim?

A. Yes, sir, that's correct.

Q. In either capacity?

A. That is correct, sir.

\* \* \* \*

**Exhibit 7**

**Deposition of plaintiff Martha Mulligan,  
conducted on March 18, 1987  
(p. 3, 8-11, 14, 27, 29)**

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[3]

March 18, 1987

5:15 p.m.

Deposition of MARTHA MULLIGAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] Q. You understand that you have been sworn and therefore, your testimony is given under oath?

A. Yes, sir.

Q. And your testimony you give today may be introduced in evidence at a trial or in connection with motions that might be filed in this case.

Do you understand that?

A. Yes, sir.

Q. Further, since there is some—there are some restrictions, though I don't necessarily agree with the statement of them by Mr. Reilly, there are some restrictions on the scope of this deposition. There is a possibility that you may have to testify again.

Having said that, would you please identify yourself more fully; give your name, address and your position and where you work and where that is?

A. Yes, sir. My name is Martha Mulligan, I live at 342 Seaver Avenue, Staten Island New York, 10305. I

work at Clove Lakes Nursing Home, 25 [9] Fanning Street, and I have worked there for the last 12 years. I am a nurse's aide. I work the 11 to 7 tour, first floor, nursing home.

Q. You are the Martha Mulligan in the caption of the third amended complaint filed in this action are you not?

A. Yes, sir, that's correct.

Q. Have you seen this third amended complaint before?

A. Yes, sir, I have.

Q. You just indicated that you worked at Clove Lakes Nursing Home for 12 years?

A. Yes, sir.

Q. Did you work at any other nursing home prior thereto?

A. Yes, sir, I worked at Seaview on Staten Island also.

Q. Is Seaview Nursing Home a contributing employer to the Greater New York Pension and Welfare Funds, do you know?

A. I really don't know. I am not sure.

Q. How long did you work at Seaview?

A. For three years.

Q. Have you had occasion to inquire, or in [10] the absence of any inquiry by you, has anybody advised you that you have a vested benefit?

A. Yes, sir.

Q. Who advised you of that?

A. Mr. Reilly.

Q. Have you ever received anything in writing that would indicate that—anything from the fund or any funds?

A. I am really not sure, Mr. Rose. I may have had some papers, like when I first joined the corporation. But I don't remember.

Q. You were aware that you are a participant in the Greater New York Pension Fund and their welfare fund



until Clove Lakes withdrew from those funds and it, together with others, created the Southern Funds?

A. Yes, sir, I understand that.

Q. Have you had occasion to claim any benefits from the Greater New York Funds, either the pension fund or the welfare fund and ever have that claim be denied? I am particularly interested in the period since Clove Lakes withdrew from the Greater New York Funds?

A. I have not drawn anything since, but I [11] did draw when I was in the hospital. I had a hysterectomy done; that was when I first joined Clove Lakes, that was 1977. I had a hysterectomy done then. You go through the HIP kind of thing and there was no problem.

Q. Is it fair to say that you have not had any experience with denial of any claims that you have made for benefits to the Greater New York Funds?

A. No, sir, I have never been denied a benefit.

Q. Are you aware of any other participants who were entitled to benefits from the Greater New York Funds, either the pension fund or the welfare fund, and it was denied?

A. Do you mean do I know anybody who had trouble with them?

Q. Yes.

A. No, sir, I don't.

Q. You were aware that while you were a participant in the Greater New York pension and welfare funds that you were entitled to that certain level of benefits either pension benefits or welfare benefits, were you not?

A. I am aware of that, yes.

\* \* \*

[14] Q. Has anybody told you that you won't receive the benefits to which you are entitled under the Southern Funds?

A. No, sir.

Q. Do you have any reason to believe that you will not receive the benefits promised to you to which you are entitled?

A. I have no reason to believe that I will not.

Q. As far as you know, are the benefits that you are entitled to not less than they were before your employer withdrew from the Greater New York?

MR. REILLY: I believe the witness was asked that question and answered it.

MR. ROSE: She said she didn't know the level.

MR. REILLY: You asked her whether or not she had comparable benefits under both and she indicated she didn't know whether or not they were comparable.

MR. ROSE: That's correct. I did ask that.

\* \* \* \*

[27] MR. REILLY: Would you finish reading.

Q. I want to focus on "have been deprived." You can read the rest. You have it in front of you.

The point I am making is you have been deprived already. I just want your explanation as to how.

MR. REILLY: I would like the record to reflect what Mr. Rose is reading. He says "have been deprived"; the sentence goes on to say "of a transfer of a portion of the Greater funds corpus attributable to the contributions made by the employers and management companies and as to which the Southern Funds have assumed the corresponding liabilities."

MR. ROSE: We have read that into the record previously. The witness has the language in front of her. I don't think it is necessary for counsel to read it into the record again.

Q. Would you answer my question?

A. No, I have not been deprived.

Q. How?

A. I have not been.

\* \* \* \*

[29] MR. ROSE: I am using the term as it is in the law.

MR. REILLY: Then you're asking the witness to draw a legal conclusion as to whether or not she is a participant.

If you want to ask her about the factual underpinnings—

Q. Ms. Mulligan, do you claim to have any rights under the Greater New York welfare fund?

A. Do I claim to have any rights under the Greater New York Fund—

Q. Benefits?

A. Yes, I do.

Q. What rights?

A. What rights do I have?

Q. This is Greater New York.

A. O.K., the Greater New York.

Q. And right now, not before?

A. I claim I have the right to be guaranteed a certain amount of retirement—

\* \* \* \*

**Exhibit 8**

**Deposition of plaintiff Edward Wizner,  
conducted on March 31, 1987  
(p. 3, 8-9, 11-14)**

[3]

March 31, 1987

11:10 a.m.

Deposition of EDWARD WIZNER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] Q. Mr. Wizner, you are an employee of who?

A. Of Clearview Nursing Home.

Q. Incidentally, would you identify yourself by giving your full name, address, where you work.

A. My name is Wizner, Edward. I'm an employee of Clearview Nursing Home in Whitestone.

Q. How long have you worked for Clearview Nursing Home?

A. 23 years.

Q. Are you aware that your employer withdrew from the Greater New York Pension and Welfare Funds?

A. Yes. It happened, Yes.

Q. And you knew that before your employer withdrew from the Greater New York Funds, that you had certain benefits?

A. Oh, yes.

Q. To which you were entitled?

[9] A. Yes.

Q. And you are now a participant in the Southern Pension and Welfare Funds, is that correct?

A. Yes.

Q. And you are entitled to certain benefits under those funds, is that correct?

A. Yes.

Q. As far as you know, are the benefits approximately comparable?

A. I wouldn't know exactly.

Q. But as far as you know, are they about the same?

A. They were promised to be the same, yes.

Q. And you have no reason to think that they have not kept their promise, is that correct?

A. No.

Q. Is there any benefit to which you are entitled under the Greater New York Funds which you have been denied?

A. Not that I know of.

\* \* \* \*

[11] Q. Mr. Wizner, you were a participant, were you not, under the Greater New York Pension Fund for more than ten years, were you?

A. Yes.

Q. Are you aware that after ten years of participation in the Greater New York Pension Fund, you have a vested right in a pension under that fund?

A. Yes.

Q. You have been told that, have you?

A. Yes, I have been told that.

Q. Has anyone told you that you won't get that pension that you have a vested right to?

A. No.

Q. From the Greater New York Pension Fund?

A. No.

Q. Do you have any reason to doubt that you will get the pension, the vested pension that you are entitled to from the Greater New York Pension Fund?

[12] A. Not that I know of.

Q. You are aware that you are a plaintiff in this action, Mr. Wizner, are you not?

A. Yes. -

Q. And as a plaintiff in this action, you have made certain allegations along with the other plaintiffs in this action, have you not?

A. Yes.

Q. One of the allegations made on your behalf as well as other plaintiffs is paragraph 45 of the complaint which I would ask you to read, please, and then I will address a question to you.

A. As are known to me—

Q. Have you read paragraph 45?

A. I read this, yes.

Q. Mr. Wizner, having read paragraph 45, I want to particularly call your attention to the words on the fourth and fifth lines thereof, and I call your attention to the past tense, "Plaintiffs have been deprived," and I would like you to tell me how you, as one of those plaintiffs, how you have been deprived. Take into account the whole paragraph as you have read it.

A. Well, it means the transfer of rules, [13] obligation to plaintiff. They were supposed to transfer the money. If they don't transfer the money, then according to me, if they don't have the money, they can't pay me out. That I think pertains to me. If there is no money, they can't pay me.

Q. Mr. Wizner, I call your attention again to the words. It says you, among the other plaintiffs, have been deprived. You have been deprived already and my question to you is, how have you been deprived to date?

A. Up to date? Not yet.

Q. Thank you very much. Not yet.

Mr. Wizner, after your employer, together with the other contributing employers to the Southern Funds, established the Southern Funds, were there some communications to you and other participants about the establishment of those funds?

A. Yes.



Q. What form did that communication take? Was it orally or was it in writing?

A. No, it was in writing. We have pamphlets.

[14] Q. You received pamphlets from them?

A. Yes.

Q. Do you recall whether the benefits you were promised by the Southern Funds were conditional upon their getting money from the Greater New York Funds?

A. Not that I remember exactly, but it was supposed to be the same or better.

Q. It was supposed to be the same level of benefits?

A. Yes.

Q. But did they tell you that you will get these benefits, but only if we get some money from the Greater New York Funds?

A. Yes.

Q. They did tell you that?

A. Yes.

Q. They told you that in writing?

A. And it was in writing too. They said the Greater New York was supposed to transfer over.

\* \* \* \*

**Exhibit 9**

**Deposition of plaintiff Yvonne Fernicola,  
conducted on March 31, 1987  
(p. 3, 8, 11-15)**

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[3]

March 31, 1987

11:50 a.m.

Deposition of YVONNE FERNICOLA, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] Q. Would you please more fully identify yourself, give your name, address, where you work and the workplace address.

A. It's Yvonne Fernicola, I live at 36-29 22nd Street, Bayside. I work at Franklin Nursing Home, 127-47 Franklin Avenue, Flushing 11355.

Q. Ms. Fernicola, you are a plaintiff in this lawsuit, are you not?

A. Yes.

Q. How long have you been an employee of the Franklin Nursing Home?

A. February 1976.

Q. Had you been an employee of any other nursing home before that?

A. No.

\* \* \* \*

[11] Q. As far as you know, are the benefits under the Southern Funds approximately the same as the benefits you had under the Greater New York Funds?

A. To my knowledge, yes.

Q. Is there any benefit to which you were entitled under the Greater New York Funds which you have been denied?

A. No.

Q. Do you know of any other participant or employee who was entitled to a benefit under the Greater New York Funds who was denied that benefit?

A. Not to my knowledge.

Q. Has anybody told you, Ms. Fernicola, that you will not receive any benefit to which you may be entitled under the Greater New York Funds?

A. No.

Q. Do you have, independent of anybody telling you such a thing, do you have any reason to believe that you might not receive any benefit to which you are entitled under the Greater New York Funds?

A. No.

[12] Q. Has anybody told you that you might not receive any of the benefits to which you are entitled under the Southern Funds?

A. No.

Q. Do you have any reason to believe that, for whatever reason, that you might not receive the benefits to which you are entitled under the Southern Funds?

A. No.

Q. To the best of your knowledge, do any of your fellow employees have any doubts as to whether they will receive benefits to which they are entitled under the Greater New York Funds?

A. Not to my knowledge.

Q. Again to the best of your knowledge, do any of your fellow employees have any doubts as to whether or not they will receive any of the benefits to which they are entitled under the Southern Funds?

A. Not to my knowledge.

Q. Ms. Fernicola, you are aware, are you not, that as a plaintiff in this action, you, together with the other plaintiffs, have made certain allegations in the third amended complaint [13] filed in this action?

A. Yes.

Q. I would ask that you read paragraph 45 of the third amended complaint before I ask the next question.

Have you read paragraph 45 of the complaint?

A. Yes.

Q. I refer now only to—I notice you turned the page, so I call your attention to the fact that paragraph 45 of the complaint consists of eight lines only on page 16 of the third amended complaint.

Having in mind that paragraph in its entirety, but calling your attention specifically to the fourth and fifth lines of that paragraph, specifically to the words, "Have been deprived," in the past tense, I ask you how you, among the other plaintiffs, have been deprived under that.

A. We have been deprived of transfer of the monies to the Southern Association to, in turn, give us an insurance of better having—making it easier for them to pay out what has to be paid out.

[14] Q. Who is "they"?

A. The Southern Association.

Q. The Southern Association. You mean the—

A. We have been deprived of transfer.

Q. Who is "we"?

A. We, the people, me.

Q. You as a participant?

A. As a participant, as an employee.

Q. To this date you feel you have been deprived as of now, is that correct?

A. That is correct.

Q. Is it your claim by virtue of this language that you have been injured in some way? You, as of this date.

A. Injured in the sense of transfer.

Q. How have you been injured? You have testified, have you not, that you have not been denied any benefit from either the Greater New York or the Southern Funds, is that correct?

A. That's correct.

Q. So, would you explain to me how you have been injured, if you feel you have been injured.

[15] MR. REILLY: The witness has already answered the question once. It is on the record.

Q. Would you answer it, please.

A. In the sense that it's a type of insurance that, in the long run, it may affect us.

Q. In the future?

A. Yes.

Q. But to date do you feel you have been injured?

A. No.

Q. Since the establishment of the Southern Funds, what communications have you received regarding those funds?

A. Nothing.

Q. Nothing orally or in writing?

A. No.

Q. How do you know that you are entitled to benefits under the Southern Funds?

A. It was talked about during the changeover, but briefly.

Q: It was talked over by who?

A. The union.

\* \* \* \*

**Exhibit 10****Deposition of plaintiff Anita Harris,  
conducted on March 31, 1987  
(p. 3, 8-14, 16-17)**

[3]

March 31, 1987

2:15 p.m.

Deposition of ANITA HARRIS, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[8] Q. Would you more fully identify yourself for the record, give your name, address, where you work and your work address.

A. My name is Anita Harris, I live at 3030 Ocean Avenue, Brooklyn, New York, I work at Seacrest Health Care Center, 3035 West 24th Street in Brooklyn, New York.

Q. How long have you worked for Seacrest Nursing Home?

A. I have been employed there since October 28, 1974.

Q. Did you work for any other nursing home before that?

A. No, I did not.

Q. And you continue to work for Seacrest Nursing Home?

A. Yes.

Q. During some of that period from 1974 forward, you were, were you not, a participant in the Local 144 Nursing Home Pension Fund and New [9] York City Nursing Home Local 144 Welfare Fund?

A. Yes.



Q. For the record, we are going to refer to those two funds as the Greater New York Funds.

What period of time, what approximate dates were you a participant in those funds, in the Greater New York Funds?

A. I'm not sure when I started to be a participant. I would say—I'm not too sure of the dates.

Q. Approximately.

A. Approximately maybe '75, 1975. What month, I have no idea. Until approximately a year and a half ago, two years ago.

Q. What happened a year and a half or two years ago?

A. When we now became involved in the Southern State Nursing Home Association.

Q. During the period that you were a participant in the Greater New York Funds, you were entitled to certain benefits under those funds, were you not?

A. I was.

Q. Were you ever denied any benefits to [10] which you were entitled by those funds?

A. No.

Q. Have you been denied any benefits to which you are entitled from the Greater New York Funds since you no longer are a participant in them, or since your employer ceased to contribute to them?

A. I want you to explain that.

Q. Well, let me try.

You indicated that you were a participant until a year and a half or two years ago in the Greater New York Funds.

A. Right.

Q. And you have already answered with regard to the period prior thereto.

My question now relates to the period from that time to date. During that year and a half to two years that you are referring to, have you been denied any benefit to which you are entitled from the Greater New York Funds?

A. I no longer receive benefits from the Greater New York. I only receive my benefits from the Southern State.

Q. When you say you receive your [11] benefits, you are referring both to the welfare plan and to the pension plan?

A. Well, I'm not on the pension, but yes, the welfare plan.

Q. Do you know whether or not you had what is referred to as a vested benefit?

A. I did have a vested benefit.

Q. In the Greater New York Pension Fund?

A. Yes.

Q. Has anybody told you that you no longer have a vested benefit?

A. No.

Q. So you are still entitled to a vested benefit under the Greater New York Pension Fund?

A. Yes.

Q. And you fully expect to receive that benefit when it becomes payable, do you not?

A. I guess. Yes, I do.

Q. I am now going to refer to the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund and I am going to refer to those as the Southern Funds.

[12] You are now a participant in the Southern Funds, are you not?

A. Yes, I am.

Q. As far as you know, are the benefits under this Southern Funds approximately the same as what they were under the Greater New York Funds?

A. They are equal.

Q. You said a few minutes ago that you have not been denied any benefit to which you are entitled from the Greater New York Funds.

A. Correct.

Q. Do you know of any other employee of a Southern employer who was denied any benefits to which he or she was entitled from the Greater New York Funds?

A. No, I do not.

Q. Has anybody told you that you won't receive the benefits that you are entitled to under the Greater New York Pension Fund?

A. No.

Q. Has anybody told you that you won't receive the benefits to which you are entitled under the Southern Funds?

[13] A. No.

Q. Do you have any reason to believe, other than being so told, do you have any reason to believe that you will not receive the benefits that were promised to you from either the Greater New York—let's try one at a time—from the Greater New York Funds?

A. No.

Q. Do you have any reason to believe that you will not receive the benefits promised to you to which you are entitled under the Southern Funds?

A. No.

Q. As far as you know, do you know of any of your fellow workers who feel that they have any reason to believe that they will not receive benefits to which they are entitled either from the Greater New York Funds or to which they are entitled under the Southern Funds?

A. Not that I am aware of.

Q. You are a plaintiff in this action and you know that by reason of being a plaintiff in this action, you, together with the other plaintiffs, have made certain allegations in the [14] third amended complaint filed in this civil lawsuit, right?

A. Right.

Q. I am going to call your attention to paragraph 45 of the third amended complaint and ask you to read it.

A. I have.

Q. Within that paragraph I call your attention specifically to lines 4 and 5 and specifically to the words "have been deprived," noting that that is past tense.

I ask you, in the context of the entire paragraph, how you, among the other plaintiffs, how you have been deprived in the sense of this paragraph.

A. Well, monies have been put aside by my employer for me to the Greater New York Nursing Home Funds, or whatever the exact words are. This money—these monies were never transferred on my behalf.

Q. Ms. Harris, I am calling your attention to the past tense and I am asking you how you have been deprived.

\* \* \* \*

[16] MR. REILLY: You are attempting to mislead the witness.

MR. ROSE: I would ask that the question be read back.

(Record read)

MR. REILLY: Let me listen to it as reread.

MR. REILLY: So that I am clear, when you ask how have you been injured or deprived, are you still referring to paragraph 45 in the context as set forth there?

MR. ROSE: I am.

MR. REILLY: The witness should be aware that is the context.

Q. I am talking about the context of paragraph 45, have no mistake about that, and my question to you is, how have you been injured or deprived, you personally? You are one of the plaintiffs. How have you been injured or deprived to date?

A. This money was contributed on my behalf from the time I became a member of the [17] Greater New York Nursing Home Association. By the time I became a member of Local 144, this money, when I did not choose to have the break in the Southern and the Greater, this money did not go along with the Southern State. This money was invested in my behalf.

Q. How have you been injured by that to date?

A. By the fact that this money was not transferred. That is the only way that I know that I have been injured.

Q. You understand that you are under oath?

A. I do.

Q. During the years that you were a participant in the Greater New York Funds, did you ever receive any communications about the terms of either or both of those funds?

MR. REILLY: I am going to object. I don't see the relevance to this witness's understanding as to whether or not she received any communications.

MR. ROSE: Whether there has been injury or not will affect standing and what (sic)

\* \* \* \*

**Exhibit 11**

**Deposition of plaintiff Mary Lindsay,  
conducted on March 31, 1987  
(p. 3, 7-8, 10-11, 14, 19)**

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[3]

March 31, 1987

2:45 p.m.

Deposition of MARY LANDSAY (sic), taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \* \*

[7] Q. Ms. Lindsay, how long have you worked at Shoreview Nursing Home?

A. I have worked there 18 years, since July of 1969. I think that is 18 years.

Q. And during much of that period of time you were a participant in the Greater New York Funds? And by that I mean the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund?

MR. REILLY: Before the witness answers, I just want to make one thing clear.

I presume when you use the term "participant," you are not asking for the witness to draw any legal conclusions and you are simply asking her to give you a factual response to the extent she interprets the term "participant"?

[8] MR. ROSE: Yes, I agree on that.

Q. I am referring to those two funds as the Greater New York Funds and my question to you is: Did you



participate in those two funds for much of that 18-year period?

A. Yes, I was a member of the Local 144, yes.

Q. Well, you were a member of Local 144 as a union, but I am referring to participating in the welfare fund and the pension fund which were sponsored by the Greater New York Funds.

Do you understand that they are different entities?

A. I know the difference, yes.

Q. Is it true that you were a participant in the Greater New York Funds for many years?

A. Yes.

Q. Do you know approximately which those years were, from what year to when?

A. It would be from the time they set it up in the nursing home because I was there when the nursing home opened.

\* \* \* \*

[10] Q. Would you please respond.

A. Yes.

Q. As far as you are aware, are the benefits to which you were entitled under the Southern funds approximately the same as the benefits to which you were entitled under the Greater New York Funds?

A. Yes.

Q. Have you been denied any benefit to which you are entitled under the Greater New York Funds?

A. No.

Q. Have you been denied any benefit to which you were entitled under the Southern Funds?

A. No.

Q. Do you know of any other employee of a Southern employer who has been denied benefits to which he or she was entitled under the Greater New York Funds where the denial was because of the withdrawal of the employer from the Greater New York Funds?

MR. REILLY: Can I have that question read back before it is answered.

[11] I didn't quite get it.

(Record read)

MR. REILLY: If she can answer the question, she can do so.

A. Not to my knowledge.

Q. Do you know of any other employee who has been denied benefits to which they are entitled, for any reason, from either the Greater New York Funds or the Southern Funds?

A. I don't understand the question.

Q. Do you know of any employee of a Southern employer who has been denied benefits to which that person is entitled from the Greater New York Funds?

A. No.

Q. Do you know of any employee of a Southern employer who has been denied benefits to which he or she is entitled from the Southern Funds?

A. I would like to ask a question, because I don't quite understand something.

Q. If you don't understand it, please say so.

A. I don't want it, you know—

\* \* \* \*

[14] Q. When did this happen?

A. I told you before, within the last two or three years.

Q. Do you know whether or not the claims that you are referring to where there was this difficulty were claims under the Southern Fund?

A. It was like in the transition. It was like in the transition from one to the other.

Q. Has anybody told you that you won't receive benefits to which you are entitled from the Greater New York Pension Fund?

A. No.

Q. Has anybody told you that you won't receive benefits to which you are entitled to receive from the Southern Pension Fund?

A. No.

\* \* \* \*

[19] Q. The education fund is not involved in this lawsuit now.

A. Well, maybe I don't understand it.

Q. Can you think of any in which you have been injured so far?

A. By the monies staying in Greater New York Fund?

Q. Yes, to this date.

A. Well, the assets that we would benefit by the monies and raises, it would be for the benefit of the employees. Anything that derives from the monies that we put in, the interest and what you have you would be for our benefit.

Q. Are you of the opinion that it would change your benefits?

A. Yes.

\* \* \* \*

**Exhibit 12****Deposition of plaintiff Ernest Dicker,  
conducted on March 31, 1987  
(p. 3, 7-16, 19-29, 31-35)**

[3]

March 31, 1987

10:10 a.m.

Deposition of ERNEST DICKER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

. . . . .

[7] Q. And, in addition, that the testimony you give today may be introduced at the trial or it may be used in connection with motions that may be filed in connection with this civil action.

Is that understood?

A. Yes.

Q. You also understand, do you, that the testimony—the scope of the testimony you are giving today is somewhat limited in scope and, therefore, it may be necessary for you to testify at a later point again.

Do you understand that?

A. Yes.

Q. Mr. Dicker, would you more fully identify yourself, your name, address, your business, business address.

A. My name is Ernest Dicker, 209-28 28th Avenue, Bayside, New York. I'm the executive director of the Clearview Nursing Home, Shoreview Nursing Home and Seacrest Health Care Center.

Q. Mr. Dicker, you are, are you not, a trustees of the Local 144 Southern New York [8] Residential Health Care

Facilities Association Pension Fund and a trustee of the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund?

A. I am.

Q. For convenience, those two funds will be referred to as the Southern Funds.

Mr. Dicker, you have been trustee of the Southern Funds for how long?

A. Since its inception.

Q. When was that?

A. I believe in the latter part of 1985.

Q. You are a plaintiff in the civil action in connection with this deposition which is being taken, and you are a plaintiff in two capacities, is that correct?

A. I believe so.

Q. You are a plaintiff as trustee of the Southern Funds?

A. Yes.

Q. And you are also a plaintiff as a contributing employer to the Southern Funds, is that correct?

A. That is correct.

[9] Q. There was a period of time, was there not, Mr. Dicker, when you were a contributing employer to the Greater New York Funds, and by the Greater New York Funds I refer to here and elsewhere to the Local 144 Nursing Home Pension Fund, New York City Nursing Home, and Local 144 Welfare Fund? You were a contributing employer to the Greater New York Funds, were you not?

A. Yes.

Q. Would you state for the record for what period of time you were a contributing employer to the Greater New York Funds?

A. For Clearview Nursing Home, from the year 1964; for Shoreview Nursing Home, since 1969; and Seacrest Health Care Center since 1974.

Q. Mr. Dicker, were you ever a trustee of either of the Greater New York Funds?

A. No.

Q. You are aware, are you not, Mr. Dicker, that as plaintiff in your two capacities in this lawsuit, you have made certain allegations in the third amended complaint?

A. Yes.

Q. Are you aware, Mr. Dicker, of any [10] employer withdrawing from the Greater New York Funds other than yourself and the other Southern employers?

A. No.

Q. Are you acquainted with any employer who has withdrawn from any multi employer-employee benefit fund?

A. No.

Q. Are the Southern Funds a plaintiff in this action?

A. Not that I know of.

Q. Are you aware that they were before the third amended complaint?

A. I believe they were. I think they were.

Q. Since you are a member of the board of trustees, since the inception of the Southern Funds, what discussions took place among the board of trustees with regard to the participation of the Southern Funds as plaintiff in this action?

A. I don't recall if it was during the time when we were trustees, but I recall there were discussions with the union trustees that they were not going to fight us in having the separate [11] funds. In fact, they said they will not fight against us.

I mean, that they would let us go to get the carve-out from the Greater New York.

Q. But as a member of the board of trustees, did not the board discuss this issue?

A. I honestly don't know whether it was at a board meeting or at times of negotiating when they were—when there was a strike.

Q. I show you page 18 of the third amended complaint and ask you what is the date of the document?

A. November 19, 1986.

Q. Since the Southern Funds were plaintiffs until that date, does it refresh your recollection whether or not



there were discussions among the board of trustees to change the status of the Southern Funds?

MR. REILLY: Objection. The witness hasn't so testified that Southern Funds were plaintiffs up until that particular date. His testimony, just so the record is correct, he says he believes they previously were a plaintiff. He didn't [12] give any time frames.

Q. What is your best recollection, Mr. Dicker, as to when Southern Funds were plaintiffs?

A. I don't recall exactly when.

Q. When was the action originally filed?

A. I believe—now I'm guessing, I don't recall the exact date when, I know we had other attorneys that were handling it and I imagine it must have been in either '85 or '86. I don't recall exactly when.

Q. But there was a change, was there not, from the status of the Southern Funds originally in the lawsuit and the third amended complaint?

A. Well, I recall that the union trustees had notified the management trustees that they did not want to be a plaintiff to this action, so, therefore, there would only be the management trustees to be the plaintiffs. Whether it was changed at that time because of not being—that the Southern Funds could be, that perhaps maybe was the time, but I remember distinctly the union trustees writing to management trustees that they didn't want to be a [13] plaintiff.

Q. Did the trustees of the Southern Funds ever authorize the Southern Funds to be plaintiffs in this action?

A. I honestly don't recall.

Q. Did they ever vote on it?

A. I don't recall them ever voting on it.

Q. They couldn't authorize it without a vote, could they?

A. That is correct.

Q. How do you explain that they were, indeed, plaintiffs in this action until the third amended complaint?

A. I can't.

Q. You don't recall a discussion of the board of trustees which resulted in the change, that is, the removal of the Southern Funds as plaintiffs in this action?

A. I don't remember discussing it with the union trustees. I remember discussing it with the management trustees and we decided to—for the management trustees to go it alone.

Q. Mr. Dicker, you are aware, are you [14] not, of an established procedure of the Southern Funds when there is a disagreement among the trustees as to how a decision is made?

A. Yes.

Q. What is that procedure?

A. If there is a deadlock, we go to arbitration.

Q. That did not happen in this case, did it?

A. That's correct.

Q. Can you explain why?

A. There was no vote.

Q. Has the board of trustees of the Southern Funds at any time ratified the bringing of this lawsuit on its behalf?

A. I don't recall whether they ever ratified it.

Q. It would be in the minutes, would it not, if they had?

A. Yes.

Q. Do you have copies of all the minutes?

A. Personally not, but the Funds have.

Q. Do you recall it ever coming to a [15] vote?

A. No.

Q. You and the other Southern employers agreed to establish the Southern Funds, did you not?

A. Yes.

Q. Why did you do so?

A. Because we felt that together with the union, we would be fair to workers since we knew the Greater New York and the Local 144 and the other funds were playing games, to use the colloquialism, with other employers by giving special deals or not paying or paying very little, and it was not fair—

Q. Please just answer my question as to why you set up the Southern Funds.

MR. REILLY: I think the witness was answering the question, Mr. Rose.

Q. Proceed.

A. Well, that would be because I personally felt that there was unfairness.

Q. Well, would it be fair to say that the question you were just answering is why you withdrew from the Greater New York Funds rather [16] than why you set up the Southern Funds?

A. No, it was jointly, because we set it up to be able to make sure that the workers would be getting their rightful benefits.

Q. But your dissatisfaction that you have expressed, I assume that—am I correct in that that was part of the reason why you withdrew from the Greater New York Funds?

A. Yes.

Q. Once having withdrawn from the New York funds, why did you set up the Southern Funds?

A. It was done—it is a joint action. In other words, we didn't withdraw from the Greater New York Funds and then separately decide. It was jointly decided to set up another fund, separate funds together with the union and then simultaneously withdraw from the other funds.

Q. When did you withdraw from the Greater New York Funds?

A. As far as I can recall, on the welfare, it was approximately October, I think, of 1985, paid until approximately that time. On the pension fund I think it was until June or July of 1984, I believe, if I am not mistaken.

\* \* \* \*

[19] Q. When did you establish the Southern Pension Fund?

A. I don't remember. We set it up—I don't recall exactly when—but it was subsequent to those dates. I don't remember exactly when.

Q. Was it not more than a year later?

A. I'm not certain as to when, but approximately a year later.

Q. So there was an interval, it was not simultaneously, between the withdrawal and the establishment of the Southern Funds, isn't that correct?

A. Yes.

Q. The establishment of the Southern Funds was a decision you and your colleagues, Southern employers, made, albeit as a result of collective bargaining with the union, isn't that correct?

A. Could you repeat the question.

MR. ROSE: I will ask that it be reread.

[20] (Record read)

A. We agreed with the union to jointly make it, to make separate funds, but the union just dragged it and kept preventing the formation, so we formed it ourselves to protect the workers, if I recall correctly.

Q. Mr. Dicker, it was the decision of you and your colleague employers, is that correct?

A. Yes.

Q. And the terms of the Southern Funds also was the result of the decision of you and your colleague Southern employers, is that correct?

A. Subject to provisions of the agreement that we had with the union.

Q. Albeit, that it was pursuant to collective bargaining?

A. Pursuant to our individual facilities' agreements with the union.

Q. But the decision was yours whether or not to have a fund and the terms of that fund, albeit those decisions were subject to collective bargaining?

A. Yes.

[21] MR. REILLY: What point of time are we talking about now?

MR. ROSE: The point in time when these decisions were made between the middle of 1984 and the establish-

ment of the Greater New York Pension Fund, he testified, about a year later, more than a year later.

A. Could I correct something.

Q. Sure.

A. You said it was a year later. Let it be known that the contract that we signed with the union was first, if I recall, November 30, 1984. So anything that was dated July of 1984 that we first started paying the escrow funds to the Greater New York—excuse me, to the Southern 144 Fund, so it is not a year later because many things were done backdated to the agreement. Do you understand me?

Q. Yes.

A. It was not a year from the time we put money in escrow until the time we set it up. Really you have to take from the time we actually signed the contract to when we set it up. Just a [22] technical difference.

Q. Let's try to clarify this point. If I understand you correctly, you are saying that the establishment of the Southern Pension Fund was retroactive?

A. That is correct.

Q. That is what you are saying?

A. Yes.

Q. But it was not actually established until more than a year later?

A. From that date we agreed on, that is correct.

Q. I am talking about from the date of your withdrawal from the Greater New York Pension Fund.

A. Correct, you are right.

Q. In the course of these discussions leading to the establishment of the Southern New York Funds, you had discussions among the Southern employers, did you not, as to whether or not to do so?

A. Yes.

Q. And further, once it was decided to have the Southern Funds, you had discussions, did [23] you not, among yourselves as to what the terms the level of benefits should be for those funds?

A. Yes.



Q. One of the terms in connection with the Southern Pension Fund was, was it not, as to whether or not to give credit for service of employees prior to the establishment of the Southern Pension Fund?

A. Yes.

Q. You had the choice of doing that, of giving such past service credit or not, but you finally decided to do so, is that correct?

A. I don't know if we had the choice. I think we discussed it with the union and they were insisting on it.

Q. Well, the union insists on a number of things. That doesn't mean that you don't have a choice if you are not willing to agree to a collective bargaining agreement on that point, isn't that correct?

A. Yes, but I believe we agreed with the union to give that.

Q. You had agreed as a matter of contract?

[24] A. On the contract, yes, with our agreement. In order to have the funds, there would be continued benefits for the workers.

Q. So the decision as to giving past service credit actually was made at an earlier point when you entered into the contract with the union, in effect?

A. That is correct.

Q. You knew you had a choice whether or not to agree with the union on that point?

A. Well, no. We didn't have a choice because otherwise we would not be able to settle the strike.

Q. You made that decision in order to settle the strike?

A. That is correct.

Q. You gave past service credit in order to settle the strike?

A. Yes, that was one of the reasons.

Q. What other reasons?

A. There were other things negotiating with the contracts.

Q. There were other points that you had to negotiate?

[25] A. Right. That wasn't the only thing.



Q. Mr. Dicker, you have brought this action as a plaintiff in your two capacities, that is as a trustee and as an employer, because you felt that you had been injured, is that correct?

A. Not me personally, but my organizations could be injured because—that money that we put away that was paid for our workers would be dissipated by those other funds.

MR. ROSE: I would ask that the question be reread.

Q. I ask you to respond to it.

(Record read)

A. Technically, yes.

Q. I would like you to explain to us for the record what that injury is to you as a trustee and then to explain what that injury is to you as an employer.

A. Well, first as a trustee, is that we have committed to give the workers, first of all, continuous benefits and to give credit for the past service.

As a trustee, if a worker worked, as I understand it, for Greater New York Funds less [26] than ten years, they will not get credit for that, and we in the Southern Funds have agreed to pay for those years. In other words, if Greater New York, if they worked seven years and three years for the Southern Funds, the Southern Funds are obligated to pay for the full ten years and that would be a big cost to our funds. As a trustee that hurts us.

Also not as a trustee, if we get our carve-out, to get what the employers of the Southern Fund had previously paid to Greater New York and if it could be paid out, paid to give into the Southern Funds, that money could earn money and give the benefits to the workers. It is—as far as an employer, we have—we have been paying the full amount in all the years for Clearview and Shoreview to substantiate the correct amount for Seacrest and the same basic principle as I stated, the last part, that is we have been paying while we know other places have not paid the full amount or not paid any, and we want

that money we paid for the workers to go to the benefit of our workers, not to other employees' benefits.

[27] Q. Let me try again. You are suing in this action as a trustee of the Southern Funds and I would like you to explain to me how you have been injured in that capacity.

A. How—up to now?

Q. How you have been injured as a trustee of the Southern Funds. That is the capacity in which you are suing, one of them.

A. I know of one former worker for Shoreview that Greater New York says they are not going to pay until she is 65 years old and we in Southern Funds feel that we are obligated to pay for that person for the "X" number of years until she is 65 because of the continuity of the benefits that she is entitled to. That has taken money. I'm custodian of the money, from—that is, taking money from the other employers, not paid by the other employers, for the benefit of all the other workers. I don't think that is fair, just to mention one matter.

Q. Do I understand correctly that your answer is that the Southern Fund is injured?

A. Yes.

Q. But you as a trustee are not injured?

[28] A. Since I represent them as trustee, I feel that I am injured too.

Q. Are you doing this in a representative capacity?

A. No. In fairness, I would say I think I represent the Southern Funds and I feel, as a trustee, that we should get that money, yes.

Q. Please let me see if I can clarify this. You are suing on behalf of the Southern Funds and it is the Southern Funds' injury that you are relating to us now, is that correct?

A. Well, my fiduciary position, I feel it is my fiduciary position that it is incumbent upon me to protect the assets of the Southern Funds and to get whatever is due them and to protect their money so that it is for the benefit of the employees.

Q. Let's move to your capacity as an employer now. Would you explain how you are injured in your capacity as an employer.

Let me repeat that.

Would you explain how you have been injured in your capacity as an employer.

[29] A. In being with the Greater New York, is that what you are trying to bring out?

Q. No. You have made allegations in this complaint that you have been injured.

A. Right.

Q. I want you to explain for us, please, how you have been injured, exactly, as an employer.

A. We have been injured because unless we get the carve-out money, what is due and fair, what we paid in all these years for our employees, that our employees would not get the proper amount of that pension or benefits that they are entitled to, because we know for a fact that other facilities that are still in Greater New York have not paid—

Q. Mr. Dicker, please listen to my question carefully.

The allegation in the complaint is that you have been injured, past tense, and I would like you to explain, please, how you have been injured as an employer.

A. I think I have been answering it.

\* \* \* \*

[31] Q. I invite you to read the whole paragraph. I am emphasizing the verbs.

A. You are saying how I'm being deprived if there is no transfer, is that what you are saying?

Q. I am emphasizing—I am asking you how you have been deprived, in that sentence.

A. By not—by the Greater New York and Local 144 depriving us of the carve-out.

Q. I want to know how you have been deprived. We are talking about you as an employer.

A. I have been deprived because if my—if the Southern Funds would have the money, they would be earning the money on that money and then the chances would be

that possibly we may be able to pay a smaller contribution to the funds and to give the same benefits to these workers. So that is one method that we have been deprived of.

Q. Getting back to your capacity as a trustee. How have you as trustee been deprived, [32] in that same paragraph?

A. As trustee, the same principle. If they have that money, then we could give possibly the workers even greater benefits, or else, you know, have the money so that this way we know it wouldn't be dissipated. We know for a fact that it has been dissipated a great deal in the other funds.

Q. What has that got to do with my question, dissipation? I'm not sure I understand that.

My question is how you have been deprived in the context of paragraph 45 of your complaint.

A. Well, I have been deprived, if we don't have custodians for that money, then we have concern that the money would be wasted and when it comes to the benefits, it is time to give the workers the benefits, there would not be adequate money to pay the workers, and that we, in the Southern Funds, would have to make it up then.

Q. Mr. Dicker, I call your attention to the verbs in that sentence again, it says "have been deprived." It has happened. What has [33] happened again?

MR. REILLY: If you want to call attention to the verbs, call attention to the whole paragraph.

MR. ROSE: He has it in front of him and I invite him to read the whole paragraph.

A. I don't understand you any more than what I just said. I think I have explained it properly.

Q. Mr. Dicker, when you and your colleague employers who contributed to the Southern Funds agreed to pay certain benefits, you also were agreeing, were you not, to pay for those benefits?

A. Yes.

Q. So that your agreement to pay for those benefits would be adequate to pay for that level of benefits you were agreeing that the funds should pay, is that correct?

A. But the exception, we had full intention that we would be getting the carve-out from the other funds—that we had paid in over the years. It was presumed, that.

[34] Q. Are you putting on the record right now under oath that you agreed to pay—that the funds should pay a level of benefits which your contributions to those funds would not adequately pay, adequately finance?

A. No. We had actuaries that said they could afford to pay.

Q. You had before you an actuarial report showing the contributions you were agreeing to pay that would finance the benefits that you were agreeing that the funds should pay to the participants?

A. That is correct.

Q. That would be without any additional funds of a transfer from the Greater New York Funds, is that correct?

A. That is correct.

Q. So that any funds you got from the Greater New York Funds would be extra?

A. It would be additional money, yes.

Q. Mr. Dicker, are you aware that as a contributing employer to the Southern Funds, you have agreed to the terms of the trust agreement of the Southern Funds?

[35] A. Yes.

Q. Similarly, you are aware, are you not, that during the period that you were a contributing employer to the Greater New York Funds, you were obligated contractually to the terms of the Greater New York trust agreement?

A. Yes.

Q. Are you aware that one of the provisions that you acknowledge you were obligated contractually to adhere to while you were a contributing employer to the Greater New York Funds, was one that stated that no employer shall have any rights—the quote begins, “No employer shall have any rights, title or interest in or to the funds or other property of the trust fund or any part thereof”?

A. Yes.

Q. Mr. Dicker, you understand, do you not, that as a trustee of the Southern Funds, you are a fiduciary of those funds?

A. Yes.

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## Exhibit 13

Deposition of plaintiff Joseph Unger,  
conducted on April 2, 1987  
(p. 3, 7-8, 19, 21, 40, 43)

[3]

April 2, 1987

10:25 a.m.

Deposition of JOSEPH UNGER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

\* \* \*

[7] Q. Would you please identify yourself more fully for the record, Mr. Unger, give your name and address, your business and business address.

A. My name is Joseph Unger. I'm the administrator of American Nursing Home at 62 Avenue B, New York City 10009.

Q. Will you give your home address.

A. I would rather the business.

Q. I think for the record you should give it.

A. 1887 48th Street, Brooklyn.

Q. Mr. Unger, you are a contributing employer to the Southern Funds? And by Southern Funds I am referring to the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 [8] Southern New York Residential Health Care Facilities Association Welfare Fund.

A. Yes.

Q. And how long have you been a contributing employer to those funds?

A. Over a year.

Q. How much over a year?

A. Sometime in '85. '84 or '85.

Q. And before that were you a contributing employer to the Greater New York Funds? By Greater New York Funds I am referring to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund.

A. Yes.

Q. For what period of time, Mr. Unger, were you a contributing employer to the Greater New York Funds?

A. American Nursing Home has been in since about 1970 and so on every year afterwards.

Q. American Nursing Home, do I understand, has been a contributing employer to the Greater New York Funds from about 1970 until when?

A. About '85.

. . . .

[19] Q. Whatever the levels of benefits were, did you not agree with the other employers and ultimately with the union to make contributions to those funds which finance those benefits?

A. Yes.

Q. Those contributions were to be adequate to provide that level of benefits? That would be presumably the prudent thing to do?

MR. REILLY: I am going to object in the sense that now you have asked a question and you have added to it a personal observation.

MR. ROSE: Indeed I have. I will withdraw that.

MR. REILLY: What have you withdrawn? The personal comment or the question?

MR. ROSE: The personal comment.

A. Can you repeat it?

MR. ROSE: Mr. Reporter?

(Record read)

. . . .

[21] MR. REILLY: Objection. The question presumes that the witness has read the trust agreements and he's already answered that he didn't read them.

Q. I understand that you have not read them, Mr. Unger.

Do you know whether or not, independent of having read them, do you know whether or not there is any condition in those documents or anywhere else which condition the providing of benefits under the Southern Funds upon the receipt of money from the Greater New York Funds?

A. I haven't seen—I haven't read the trust agreements.

Q. Apart from your reading of it, do you know of any condition on the providing of benefits by the Southern Funds on the receipt of money from the Greater New York Funds?

A. No.

. . . . .

[40] MR. ROSE: I am not misstating anything.

Q. I am asking you that question. Are you suggesting that the American Nursing Home is entitled to a portion of the funds of the Greater New York Funds?

A. No.

Q. Do I understand correctly then that the injury to the American Nursing Home is by virtue of the failure of the defendants to transfer money to somebody else other than the American Nursing Home?

MR. REILLY: Can we have who the somebody else is.

MR. ROSE: The Southern Funds.

A. Yes.

Q. Are you, the American Nursing Home here, in a representative capacity on behalf of the Southern Funds?

A. I'm a contributor.

Q. I understand you are. Please answer my question.

A. I don't know.

. . . . .

[43] MR. REILLY: No. You asked about any additional injuries. He already gave you—

MR. ROSE: You didn't let me finish my question.

MR. REILLY: Finish.

Q. Whether the American Nursing Home has been injured in any other way in addition to the failure to transfer funds by the defendants to the Southern Funds.

A. I think I explained myself before.

Q. I insist upon a direct answer to my question.

A. As of now, I don't think so.

Q. Mr. Unger, it is so, is it not, that you are not a contributing employer to the Greater New York Funds and haven't been for some time, is that correct?

A. Presently?

Q. You are not and haven't been for some time a contributing employer to the Greater New York Funds, is that correct?

A. Yes.

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